Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

ANTHONY RUTLEDGE, an individual on his own behalf and on behalf of the BENEFICIARIES OF THE HOTEL UNION AND HOTEL INDUSTRY OF HAWAII PENSION TRUST; AFL HOTEL & RESTAURANT WORKERS' HEALTH AND WELFARE FUND,

Petitioners,

v.

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, a California Law Partnership; MITCHELL WHITEHEAD, an individual,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a Court of Appeals, which disagrees with a District Court's remand order (based on the District Court's determination that ERISA does not preempt Plaintiffs' statutory state law and common law claims against a pension plan's non-fiduciary attorney), nonetheless use its limited jurisdiction to review the District Court's award of attorneys fees under 28 U.S.C. § 1447(c), as a jurisdictional pretext to effectively overrule the District Court's non-appealable remand order?

2. Did Congress, in enacting ERISA's party in interest provisions (29 U.S.C. §§ 1106(a) and 1108(b)), intend to completely preempt run-of-the-mill claims for state statutory violations of professional conduct, breach of contract and fraud against the pension plan's non-fiduciary attorney?

PARTIES TO THE PROCEEDINGS

Petitioners are Anthony Rutledge, a Trustee of and participant in the Hotel Union and Hotel Industry of Hawaii Pension Trust and AFL Hotel & Restaurant Workers Health & Welfare Trust Fund, on his own behalf and on behalf of all participants and beneficiaries of said plans. Petitioners were the Plaintiffs in the state court and District Court and the Appellees in the Ninth Circuit Court of Appeals.

Respondents are Seyfarth, Shaw, Fairweather & Geraldson, and Mitchel Whitehead. Respondents were the Defendants in the state court and District Court and were the Appellants in the Ninth Circuit Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

None of the parties to this petition is a corporation which has a parent corporation and no publicly held corporation owns 10% or more of any party to this petition.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	ii
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vii
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	5
I. The Court Of Appeals De Facto Review Of A Non-Reviewable Remand Order Wreaks Havoc On Judicial Administration	5
II. The Court Of Appeals Decision Conflicts With Prior Decisions Of This Court, Other Circuit Courts Of Appeal And Other Ninth Circuit Decisions Regarding ERISA Preemption.	8
Conclusion	13

TABLE OF CITED AUTHORITIES

Page

Cases:

Airparts Co. v. Custom Benefit Services, 28 F.3d 1062 (10th Cir. 1994) 11

Aloha Airline, Inc. v. Ahue, 12 F.3d 1498 (9th Cir. 1993) 10

Arizona State Carpenters Pension Trust v. Citibank, 125 F.3d 715 (9th Cir. 1997) 4, 12

Bucary v. Rothrock, 883 F.2d 447 (6th Cir. 1989) ... 4, 5, 7

California Div. of Labor Standards Enforcement v. Dillingham Const., 519 U.S. 319, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997) 4

Coyne & Delancy Co. v. Selman, 98 F.3d 1457 (4th Cir. 1996) 9

Custer v. Sweeney, 89 F.3d 1156 (4th Cir. 1996) 4, 9, 11

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) 10, 11

Geweke Ford v. St. Joseph's Omni Preferred Care Inc., 130 F.3d 1355 (9th Cir. 1997) 4, 12

Landwehr v. DuPree, 72 F.3d 726 (9th Cir. 1995) ... 8

Cited Authorities

Page

Lockheed Corp. v. Spink, 517 U.S. 882, 116 S. Ct. 1783, 135 L. Ed. 2d 153 (1996) 4, 8, 9, 12

Mackey v. Lanier Collection Agency & Serv. Inc., 486 U.S. 825, 108 S. Ct. 2182, 100 L. Ed. 2d 836 (1995) 4, 10

Mobil Corp. v. Alveille Gen. Ins. Co., 984 F.2d 664 (5th Cir. 1993) 5, 6

New York State Conf. of Blue Cross v. Travelers, 514 U.S. 645, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995) 4, 10, 12

Nieto v. Ecker, 845 F.2d 868 (9th Cir. 1988) 8

Painters Dist. Council No. 21 Welfare Fund v. Price Waterhouse, 879 F.2d 1146 (3d Cir. 1989) 11

Pappas v. Buck Consultants, Inc., 923 F.2d 531 (7th Cir. 1991) 11

Roth Packing Co. v. Becker, 530 F.2d 1295 (9th Cir. 1975), *aff'd*, 430 U.S. 519, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1976) 6

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) ... 10

Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 116 S. Ct. 494, 1336 L. Ed. 2d 461 (1995) 4, 5

Cited Authorities

Page

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1447(c) ..... i, 1, 3, 4

28 U.S.C. § 1447(d) 1, 2, 4, 5, 7

29 U.S.C. § 1106 9

29 U.S.C. § 1106(a) ..... i, 1, 8

29 U.S.C. § 1108(b) ..... i, 1, 8

29 U.S.C. § 1144(a) 10

California B&P Code § 6148 2

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Ninth Circuit Dated And Filed January 12, 2000 ..... 1a

Appendix B — Order And Amended Opinion Of The United States Court Of Appeals For The Ninth Circuit Denying Petition For Rehearing Dated And Amended April 5, 2000 ..... 26a

Appendix C — Transcript Of Proceedings Of The United States District Court For The Northern District Of California Dated December 19, 1997 ..... 30a

Appendix D — Order Of The United States District Court For The Northern District Of California Dated And Filed December 31, 1997 ..... 54a

Appendix E — Order Of The United States District Court For The Northern District Of California Dated And Filed January 26, 1998 ..... 56a

Appendix F — Relevant Statutes 60a

Appendix G — Class Action Complaint Dated August 15, 1997 And Filed August 27, 1997 ... 69a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Ninth Circuit opinion (App. A) is reported at *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d 1212 (9th Cir. 2000). The Ninth Circuit opinion as modified (App. B) is reported at *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 208 F.3d 1170 (9th Cir. 2000). The District Court decision remanding the case (App. C) is unpublished. The District Court decision awarding attorneys' fees (App. D) is unpublished.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered January 12, 2000. The Court of Appeals entered an order denying a timely petition for rehearing and suggestion for rehearing en banc on April 5, 2000 (App. B).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. § 1447(c); 28 U.S.C. § 1447(d); 29 U.S.C. §§ 1106(a) and 1108(b), each of which are set forth in Appendices E, F and G respectively.

STATEMENT OF THE CASE

On August 27, 1997, Rutledge filed this action in the San Francisco County Superior Court ("state court"), alleging that the Seyfarth Defendants breached their contract to provide legal services to Rutledge's retirement plans at the rate of $155/hour by charging more than the $155/hour agreed-to-price. Rutledge also alleged that Seyfarth breached their common law fiduciary duties (as attorneys) to Rutledge, committed fraud and violated California B&P Code § 6148 by failing to disclose to Rutledge or the plans the true hourly rate they were charging, what legal work was being done, who performed the work, the amount of time spent, etc., in order to hide the fact that Seyfarth was charging more than the $155/hour agreed to.

Seyfarth removed the case to the United States District Court for the Northern District of California on the grounds that the Complaint was completely preempted by ERISA.

Rutledge timely moved to remand the case on the grounds that ERISA did not preempt his state law claims.

The United States District Court, after full briefing and argument, ruled that the Complaint was *not* preempted by ERISA and ordered the case remanded back to state court. That remand order was and is, *as a matter of law*, non-reviewable by appeal or otherwise. 28 U.S.C. § 1447(d) provides in pertinent part:

> (d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . .

Seyfarth did not (and could not) appeal or seek review of the District Court's remand decision that Rutledge's claims were not preempted by ERISA.

On January 26, 1998, the District Court issued a separate order awarding Rutledge $23,052.22 in attorneys fees and costs, pursuant to 28 U.S.C. § 1447(c).

Seyfarth appealed, but only from the Order awarding attorneys fees. Seyfarth did not and could not appeal from the District Court's remand order determining that ERISA did *not* preempt Rutledge's state law claims.

On January 12, 2000, a panel of the Ninth Circuit issued a decision ostensibly reversing the District Court's award of attorneys fees and costs. However, in reality, the Court was issuing a de facto "reversal" of the remand order. The Ninth Circuit enunciated (for the first time in that opinion) its new theory that a state law claim against a non-fiduciary is preempted by ERISA if that claim "bears on an ERISA regulated relationship." (App. A at p. 16a.) The Ninth Circuit held that the District Court abused its discretion by not applying this new preemption test. Neither this Court nor any other court to Petitioners' knowledge had ever enunciated such a rule of ERISA preemption. Petitioners are not aware of any other court of appeal using its jurisdiction to review an attorney fee award under 28 U.S.C. § 1447(c) to seek, in effect, to *reverse* a non-appealable remand order.

Seyfarth then attempted (in the state court) to use the Ninth Circuit's non-binding *dicta* to argue that the Ninth Circuit "decision" was a collateral estoppel bar which required a summary judgment dismissal because the Ninth Circuit had "ruled" that Rutledge's claims were preempted by ERISA.

On March 28, 2000, the San Francisco Superior Court denied Seyfarth's motion for summary judgment, but Seyfarth continues to litigate that the Ninth Circuit "decided" that ERISA preempts Rutledge's state court claims.

The Ninth Circuit's newly created rule of ERISA preemption is not based on any Supreme Court or other Court of Appeal decision or ERISA. More importantly, it conflicts with the decisions of this Court in *New York State Conf. of Blue Cross v. Travelers*, 514 U.S. 645, 655, 115 S. Ct. 1671, 1676, 131 L. Ed. 2d 695 (1995); *Mackey v. Lanier Collection Agency & Serv. Inc.*, 486 U.S. 825, 833, 108 S. Ct. 2182, 2187, 100 L. Ed. 2d 836 (1995); *California Div. of Labor Standards Enforcement v. Dillingham Const.*, 519 U.S. 319, 117 S. Ct. 832, 136 L. Ed. 2d 791 (1997) and *Lockheed Corp. v. Spink*, 517 U.S. 882, 889 n.3, 116 S. Ct. 1783, 1789 (1996). It also conflicts with the ERISA preemption decisions of the Ninth Circuit. *Arizona State Carpenters Pension Trust v. Citibank*, 125 F.3d 715, 723-724 (9th Cir. 1997); *Geweke Ford v. St. Joseph's Omni Preferred Care Inc.*, 130 F.3d 1355, 1358-1360 (9th Cir. 1997) and other circuit courts of appeal *Custer v. Sweeny*, 89 F.3d 1156, 1166-1167.

The Ninth Circuit's decision, which indirectly reviews (and attempts to de facto reverse) the District Court's decision to remand, is contrary to the decision of this Court in *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128, 116 S. Ct. 494, 1336 L. Ed. 2d 461 (1995) which held that an order of remand based on 28 U.S.C. § 1447(c) is not reviewable *on appeal or otherwise*. (Emphasis added.) The Ninth Circuit's decision to review the remand order under the guise of reviewing the District Court's award of attorneys fees under 28 U.S.C. § 1447(d) also conflicts with the Sixth Circuit Court of Appeal's decision in *Bucary v. Rothrock*,

883 F.2d 447, 449 (6th Cir. 1989). ["It is not possible to hold on the one hand that the case was not removed improvidently and without jurisdiction . . . without implicitly reviewing and rejecting the District Court's order to remand."]

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS DE FACTO REVIEW OF A NON-REVIEWABLE REMAND ORDER WREAKS HAVOC ON JUDICIAL ADMINISTRATION

The Ninth Circuit had before it the simple issue of whether the District Court abused its discretion in awarding Rutledge attorneys fees incurred as a result of Seyfarth's removal. The Ninth Circuit had limited jurisdiction to decide only the propriety of the attorneys fees awarded. *Bucary v. Rothrock*, 883 F.2d. 447, 449 (6th Cir. 1989).

The Ninth Circuit did not, however, have jurisdiction to review (or reverse) the District Court's order remanding the case. 28 U.S.C. § 1447(d); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-128:

> As long as a district court's remand is based on the grounds for remand recognized by § 1447(c) — a Court of Appeals lacks jurisdiction to entertain an appeal of the remand order . . .

The purpose of 28 U.S.C. § 1447(d)'s prohibition on appellate review of remand orders is to allow the state court action to proceed without further delays, *Mobil Corp. v.*

Alveille Gen. Ins. Co., 984 F.2d 664 (5th Cir. 1993) and to avoid further litigation on the issue of forum. *Roth Packing Co. v. Becker*, 530 F.2d 1295 (9th Cir. 1975), *aff'd*, 430 U.S. 519, 97 S. Ct. 1305, 51 L. Ed. 2d 604.

That purpose is frustrated if, as here, a Court of Appeals can circumvent the prohibition by reviewing (de facto reversing) the District Court's remand order under the guise of reviewing the District Court's award of attorneys fees. The Ninth Circuit spent all ten pages of its published opinion creating a new test for ERISA preemption[1] which had the effect of reversing the District Court's non-appealable remand order.

Despite its lack of jurisdiction, the Ninth Circuit de facto "reversed" the District Court's decision by holding "[w]e conclude that removal was proper . . ." (App. A, p. 2a) . . . and further "holding" that "the state law claims are *completely* preempted, allowing removal despite the well pleaded compliant rule." (App. A, p. 25a.)

The effect of the Ninth Circuit's impermissible review was that the Seyfarth defendants were then able to use the Ninth Circuit's "holding" as the basis to argue in state court that Rutledge's claims were preempted by ERISA and had to be dismissed and that the state court did not have jurisdiction over these "ERISA" claims. The Ninth Circuit's "holding" that Rutledge's claims were preempted by ERISA is precisely the opposite of the nonappealable decision of the District Court which held that the same state claims were

1. As discussed, *infra*, the Ninth Circuit held that the District Court abused its discretion by not applying the Court's newly formulated preemption test which did not even exist when the District Court rendered its decision.

not preempted by ERISA. Because of the Ninth Circuit's impermissible review, the state court was left with to two conflicting "final" decisions regarding preemption. That has created a judicial morass over jurisdiction which is *still* ongoing.

It was precisely to avoid this endless litigation and conflict that § 1447(d) was enacted. The Sixth Circuit Court of Appeals recognized the impossible conflict which could ensue if a court of appeals was allowed to review the remand order (and find it erroneous) and yet, not be able to reverse the remand order. *Bucary v. Rothrock*, 883 F.2d 447 449 (6th Cir. 1989) [". . . if this Court were to . . . accept defendant's argument, we would in effect be reviewing that which . . . is unreviewable . . . It is not possible to hold on one hand that the case was not remanded improvidentially . . . without explicitly reviewing and rejecting . . . the order to remand."]

If the Ninth's Circuit's decision is not reversed by this Court, it will provide a precedent which could lead to conflicting decisions between the District Courts and Courts of Appeals and endless procedural confusion and chaos.

II.

THE COURT OF APPEALS DECISION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT, OTHER CIRCUIT COURTS OF APPEAL AND OTHER NINTH CIRCUIT DECISIONS REGARDING ERISA PREEMPTION.

A writ is also required because the Ninth Circuit's decision has created a new ERISA preemption test which conflicts with the holdings of this Court, other circuits and within the Ninth Circuit. This conflict will create enormous confusion in this highly important area of the law — ERISA preemption.

In its decision, the Ninth Circuit has created a new and heretofore unprecedented test for determining whether run of the mill state law claims against a non-fiduciary are preempted by ERISA. The Ninth Circuit's decision holds that a state law claim is preempted by ERISA if it "bears on an ERISA regulated relationship." (App. A, p. 16a.) The Ninth Circuit extrapolated based on its prior decisions in *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988) and *Landwehr v. DuPree*, 72 F.3d 726, 733 (9th Cir. 1995) that ERISA (29 U.S.C. §§ 1106(a) and 1108(b)) create a separate cause of action against a party in interest and therefore since claims can be asserted against parties in interest, they are an "ERISA regulated relationship."

The Ninth Circuit then held that if ERISA claims can be asserted, then they preempt all state law claims. However, the Ninth Circuit's analysis conflicts with this Court's decision in *Lockheed Corp. v. Spink*, 517 U.S. 882, 889 n.3, 116 S. Ct. 1783, 135 L. Ed. 2d 153 (1996).

In *Lockheed*, this Court specifically stated that § 406 of ERISA (29 U.S.C. § 1106) regulates the conduct of "plan *fiduciaries*" and that to sustain a claim under § 406, the plaintiff must show that a plan *fiduciary* caused the plan to engage in an unlawful transaction. *Id.* at 888. This Court went on to state that for a non-fiduciary to be liable for breach of § 406, a *fiduciary* must have caused the plan to enter into the prohibited transaction with the party in interest. *Id.* at 890 n.3.

Thus, where it is the party in interest (not the fiduciary) who, through his own wrongful conduct, has caused the plan to pay excessive compensation to the non-fiduciary,[2] then there is *no* § 406 violation because the wrongful conduct was not caused by a fiduciary. Therefore, there is no ERISA provision regulating a party in interest's *self initiated* violations (such as fraud, breach of contract, breach of fiduciary duty). Since there is no regulation of the party in interest's self-initiated wrongs, there is no "ERISA governed relationship." (App. A, p. 1221.)

Other Circuit Courts of Appeal that have dealt with the question of claims against non-fiduciary plan attorneys (or professionals) engaging in tortious conduct or breach contract have held that such run of the mill state law claims are not preempted by ERISA. *Custer v. Sweeny*, 89 F.3d 1156, 1167 (4th Cir. 1996); *Coyne & Delancy Co. v. Selman*, 98 F.3d 1457, 1468-69 (4th Cir. 1996).

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2. Rutledge has alleged that through fraud, breach of contract and state statutory violations, the *non-fiduciary* attorneys caused the Plan to pay higher attorney fees than agreed to. (App. G.) This is not a claim of agreeing to excessive fees. It is a claim of fraud by being defrauded into paying more than Plaintiffs had agreed to pay.

The Ninth Circuit decision also conflicts with other decisions of this Court. *New York State Conf. of Blue Cross v. Travelers*, 514 U.S. 645, 655, 115 S. Ct. 1671, 1676, 131 L. Ed. 2d 695 (1995).

Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides that ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by the Act. In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983), this Court noted that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." This Court has cautioned against an "uncritical literalism in construing the terms 'relate to' and 'connection with.' " *New York State Conf. of Blue Cross v. Travelers*, 514 U.S. 645, 655, 115 S. Ct. 1671, 1676, 131 L. Ed. 2d 695 (1995). As a result, courts must "go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id. See also Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 8 (1987) "Where a state law affects employee benefit plans in a tenuous, remote or peripheral manner . . . the law does not 'relate to' an ERISA plan." *Aloha Airline, Inc. v. Ahue*, 12 F.3d 1498, 1504 (9th Cir. 1993), *citing Shaw*, 463 U.S. at 100 n.21. For example, "lawsuits against ERISA plans for run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan" are not preempted. *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 833 (1988).

Employee benefit plans necessarily enter into a wide range of economic transactions with non fiduciary service providers, such as landlords, banks, attorneys, accountants, actuaries and brokers. ERISA does not purport to supplant the body of state law regulating these commercial transactions. When a plan leases property, enters into a contract, purchases stock, or hires a consultant, it is generally subject to the same state law protections and duties as other parties.

The panel's decision also conflicts with several circuits which have readily concluded that ERISA does not generally preempt state law contract, negligence and malpractice actions brought by plans against nonfiduciary service providers. *See, e.g., Custer v. Sweeney*, 89 F.3d 1156 (4th Cir. 1996) (attorney malpractice claim not preempted by ERISA); *Airparts Co. v. Custom Benefit Services*, 28 F.3d 1062 (10th Cir. 1994) (ERISA does not preempt suit by plan trustees against an actuarial firm for negligence, implied indemnity and fraud in connection with plan amendment and the calculation of pension benefits; *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 540 (7th Cir. 1991) (ERISA beneficiaries may bring state law malpractice suits against plan consultants); *Painters Dist. Council No. 21 Welfare Fund v. Price Waterhouse*, 879 F.2d 1146, 1153 n.7 (3d Cir. 1989) ("ERISA does not generally preempt state professional malpractice actions").

ERISA was enacted to protect the interests of plans and their beneficiaries (*see, e.g., Fort Halifax*, 482 U.S. at 8), not to insulate plans' service providers from their ordinary state law obligations to obey contracts and refrain from fraud and misrepresentation.

The Ninth Circuit's other decisions also conflict with the Ninth Circuit's decision in this case. Those other Ninth Circuit panels have held that claims against non-fiduciaries committing wrongful acts which do not affect benefits or the administration of the plan are not preempted. *Arizona State Carpenters Pension Trust v. Citibank*, 125 F.3d 715, 723 (9th Cir. 1997).

ERISA does not preempt regulation of those ERISA relationships "where a plan operates just like any other commercial entity." Congress did not intend ERISA to supplant state law in fields of traditional state regulation. *Geweke Ford v. St. Joseph's Omni Preferred Care Inc.*, 130 F.3d 1355, 1358 (9th Cir. 1997) (*citing New York Conf. of Blue Cross v. Travelers*, 514 U.S. 645, 661, 115 S. Ct. 1671, 1679 (1995)).

ERISA does not preempt run of the mill claims even though they involve and affect the plan. *Geweke Ford, supra.*

State law claims against non-fiduciary attorneys (or other service providers) do no implicate the relationships among traditional plan entities (fiduciaries) because the plan is operating just like any other commercial entity, i.e. obtaining legal services as a client. Regulation of attorneys has traditionally been an exercise of state authority.

The "bears on an ERISA regulated relationship" test enunciated by the Ninth Circuit is erroneous. It conflicts with this Court's prior ERISA preemption decisions. It attempts to impose ERISA "regulation" of claims for acts of non-fiduciaries which ERISA does not regulate. *Lockheed, supra.*

A writ should be granted so that this Court can reverse the potentially devastating effect the Ninth Circuit decision will have on run of the mill commercial claims which plans and their participants may have against non-fiduciary service providers which do not affect benefits or plan administration and which are not and were never meant to be preempted by ERISA.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED JANUARY 12, 2000

Anthony RUTLEDGE, an individual on his own behalf and beneficiaries of the Hotel Union and Hotel Industry of Hawaii Pension Trust; AFL Hotel and Restaurant Workers' Health and Welfare Fund,

Plaintiffs-Appellees,

v.

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, a California Law Partnership; Mitchell Whitehead, an individual,

Defendants-Appellants.

No. 98-15298.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 9, 1999.

Filed Jan. 12, 2000.

* * *

Before: O'SCANNLAIN and WARDLAW, Circuit Judges, and BYRNE,[1] District Judge.

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1. The Honorable Wm. Matthew Byrne, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

Appendix A

WARDLAW, Circuit Judge:

Seyfarth, Shaw, Fairweather, & Geraldson, a law firm, and Mitchell Whitehead, one of its attorneys (collectively, "Seyfarth"), appeal from the district court's order awarding attorneys' fees and costs under 28 U.S.C. § 1447(c) to Anthony Rutledge and the AFL Hotel and Restaurant Workers' Health and Welfare Fund (collectively, "Rutledge"). The court made the award on the strength of its prior decision remanding the underlying action to state court for lack of federal subject-matter jurisdiction, despite Seyfarth's claim of preemption under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA"). Seyfarth's appeal presents the question whether the district court abused its discretion in awarding the fees and costs. We conclude that removal was proper, and, accordingly, we reverse.

I

The Hotel Union and Hotel Industry of Hawaii Pension Trust and the AFL Hotel & Restaurant Workers' Health and Welfare Fund (collectively, the "Plans") are two multi-employer employee benefit plans. The Plans are governed by ERISA. Rutledge is a labor trustee for and participant in the Plans. Seyfarth has provided legal services to the Plans since 1984.

Rutledge brought suit in the Superior Court of California on behalf of himself and all other participants and beneficiaries of the Plans. Rutledge claimed that Seyfarth overcharged the Plans for legal services rendered between

1986 and 1998 by charging them for Whitehead's time at his then-current hourly rate, which exceeded an allegedly agreed-upon rate of $155 per hour.[2] Rutledge raised various state law claims: breach of contract, breach of the covenant of good faith, breach of fiduciary duty, fraud, constructive fraud, and negligent misrepresentation. He prayed for relief in the form of damages according to proof, punitive damages, costs and attorneys' fees, and other relief as deemed appropriate by the court. The complaint did not expressly allege any causes of action under ERISA.

Seyfarth removed the complaint to the United States District Court for the Northern District of California on October 3, 1997, pursuant to 28 U.S.C. § 1441. Seyfarth sought to invoke the district court's federal question jurisdiction under 28 U.S.C. § 1331, on the grounds that ERISA preempted the state law claims such that there was federal jurisdiction despite the absence of any federal cause of action on the face of the complaint. Seyfarth then moved for judgment on the pleadings. Rutledge contested the removal and moved to remand.

On December 19, 1997, the district court conducted a hearing on the motion to remand. Relying on our decision in *Yeseta v. Baima,* 837 F.2d 380 (9th Cir.1988), the district

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2. Rutledge maintains that the parties entered into a written contract in 1984 fixing the rate of Seyfarth's legal services at $155 per hour. Seyfarth concedes that the hourly rate of compensation for legal services provided at that time by its attorneys was $155 per hour but contests that a contract bound the parties to that rate. The district court never explicitly determined whether the alleged contract actually exists, and the record before us is inconclusive.

court stated that, "[i]t seems plain that the services to be performed by the Seyfarth firm . . . were traditional attorney services, and thus these professional functions will not support a determination that ERISA applies to their performance. And, accordingly, the basis for removal under ERISA is absent." Implicitly, the court concluded that the only basis for preemption would be a claim against Seyfarth in its fiduciary capacity and that *Yeseta* precluded it from finding that a fiduciary relationship existed. Because the district court determined that ERISA did not preempt Rutledge's state law claims and therefore did not confer federal subject-matter jurisdiction over the action, the court granted Rutledge's motion to remand and dismissed Seyfarth's motion for judgment on the pleadings as moot.

After issuing its remand order, the district court ruled that Rutledge was entitled to attorneys' fees and costs, pursuant to 28 U.S.C. § 1447(c),[3] under the rule of *Moore v. Permanente Medical Group, Inc.*, 981 F.2d 443, 445 (9th Cir.1992), that a district court retains jurisdiction to award

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3. Section 1447 provides, in pertinent part:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.

28 U.S.C. § 1447(c).

costs and fees pursuant to 28 U.S.C. § 1447(c) even after issuing a remand order. The court ordered briefing as to the proper amount of attorneys' fees and costs, and on January 26, 1998, entered an order awarding $23,052.22, the full amount requested by Rutledge.[4]

Seyfarth timely appealed, invoking our jurisdiction under 28 U.S.C. § 1291.

II

On appeal, Seyfarth challenges the award of attorneys' fees, in part on the ground that the action should not have been ordered remanded.

A

Although the district court's remand order is not reviewable in this Court, *see* 28 U.S.C. § 1447(d), we do review the district court's award of attorneys' fees for abuse of discretion, *see K.V. Mart Co. v. United Food and Commercial Workers Int'l Union, Local 324*, 173 F.3d 1221, 1223 (9th Cir.) (citing *Moore*, 981 F.2d at 447), *cert. denied*, __ U.S. __, 120 S.Ct. 176, 145 L.Ed.2d 148 (1999), and one component of this review is "some consideration of the underlying remand order," *Moore*, 981 F.2d at 447. Although the district court has "wide discretion" in assessing fees under § 1447(c), *id.*, we must reverse an award of attorneys' fees

4. The district court held that the fees and costs should include those related to the motion for judgment on the pleadings. Because we reverse the award of the attorneys' fees as a whole, we do not reach the question of their proper components or amount.

if the district court's exercise of discretion was grounded in a determination of law that we reject. *See id.* (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990)). We review the district court's legal determination as to the propriety of removal, like all questions of subject-matter jurisdiction, *de novo*. *See Toumajian v. Frailey*, 135 F.3d 648, 652 (9th Cir.1998) (citing *Kruse v. State of Hawaii*, 68 F.3d 331, 333 (9th Cir.1995)).

With these principles in hand, we turn to the question of whether Seyfarth properly removed the action to federal court.

B

Rutledge's complaint did not allege a federal cause of action on its face. Seyfarth therefore could have established federal subject-matter jurisdiction supporting removal if, but only if, ERISA "completely preempts" the state law claims. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987); *Toumajian v. Frailey*, 135 F.3d 648, 653-54 (9th Cir.1998).

"Federal pre-emption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court." *Metropolitan Life Ins. Co.*, 481 U.S. at 63, 107 S.Ct. 1542. However, "[a]n independent corollary to the well-pleaded complaint rule is the 'complete preemption' doctrine." *Id.* at 1358; *see Harris v. Provident Life and Accident Ins. Co.*, 26 F.3d 930, 934

(9th Cir.1994). "That is, '[o]n occasion, . . . the pre-emptive force of a statute is so "extraordinary" that it "converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." ' " *Harris,* 26 F.3d at 934 (quoting *Caterpillar Inc. v. Williams,* 482 U.S. 386, 393, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987)).

ERISA completely preempts a claim under state law, permitting the defendant to remove despite the well-pleaded complaint rule, if two circumstances exist: "(1) ERISA preempts the plaintiff's cause of action and (2) the cause of action falls within the scope of [ERISA's civil enforcement provision,] 29 U.S.C. § 1132(a)." *Emard v. Hughes Aircraft Co.,* 153 F.3d 949, 953 (9th Cir.1998), *cert. denied,* __U.S. __, 119 S.Ct. 903, 142 L.Ed.2d 902 (1999); *see Buster v. Greisen,* 104 F.3d 1186, 1188 (9th Cir.1997) (Complete preemption occurs only when ERISA both "preempts" the state claim and "displaces the claim with its civil enforcement provision."), *cert. denied,* 522 U.S. 981, 118 S.Ct. 441, 139 L.Ed.2d 378 (1997).

i.

Developing a rule to identify whether ERISA *preempts* a given state law — the first step in determining whether ERISA *completely preempts* the law — has bedeviled the Supreme Court. *See California Div. of Labor Standards v. Dillingham,* 519 U.S. 316, 335, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997) [hereinafter "*Dillingham*"] (Scalia, J., concurring) ("Since ERISA was enacted in 1974, this Court has accepted certiorari in, and decided, no less than 14 cases to resolve

conflicts in the Courts of Appeals regarding ERISA pre-emption of various sorts of state law. The rate of acceptance, moreover, has not diminished . . . ." (footnote omitted)). The starting point has been the statute itself, which provides that ERISA preempts a state law claim if the claim "relates to" an employee benefit plan. 29 U.S.C. § 1144(a). The Court has regularly emphasized the broad effect of this statute. *See Dillingham,* 519 U.S. at 324, 117 S.Ct. 832 (quoting prior cases using the phrases "clearly expansive," "broad scope," "expansive sweep," "broadly worded," "deliberately expansive," and "conspicuous for its breadth"). "In more recent decisions, however, the Supreme Court has limited the scope of the 'relate to' provision of ERISA." *Bast v. Prudential Ins. Co. of Am.,* 150 F.3d 1003, 1007 (9th Cir.1998), *cert. denied,* __ U.S. __, 120 S.Ct. 170, 145 L.Ed.2d 144 (1999).

The Court has stated that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a *connection with* or *reference to* such a plan." *Ingersoll-Rand Co. v. McClendon,* 498 U.S. 133, 139, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990) (quoting *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 96-97, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983)) (emphasis added). Additionally, the Court has given a fairly precise and narrow definition — not applicable to the case before us — to the phrase "reference to." *See Dillingham,* 519 U.S. at 325, 117 S.Ct. 832 ("Where a State's law acts immediately and exclusively upon ERISA plans . . . or where the existence of ERISA plans is essential to the law's operation . . . that 'reference' will result in pre-emption."). However, the Court has not provided such defined content to the phrase "connection with." "Rather, to

determine whether a state law has the forbidden connection, we look both to 'the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,' as well as to the nature of the effect of the state law on ERISA plans." *Dillingham,* 519 U.S. at 325, 117 S.Ct. 832.

In analyzing these objectives, the Court has written that "[t]he basic thrust of the pre-emption clause [is] to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 657, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995) [hereinafter "*Travelers*"].[5] It has also emphasized more generally "[t]he principal object of the statute [ERISA] is to protect plan participants and beneficiaries." *Boggs v. Boggs,* 520 U.S. 833, 845, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997). In contrast, the Court has established a presumption that Congress did *not* intend ERISA to preempt areas of "traditional state regulation" that are "quite remote from the areas with which ERISA is expressly concerned — 'reporting, disclosure, fiduciary responsibility, and the like.' " *Dillingham,* 519 U.S. at 330, 117 S.Ct. 832 (quoting *Travelers,* 514 U.S. at 661, 115 S.Ct. 1671 (quoting *Shaw,* 463 U.S. at 98, 103 S.Ct. 2890));

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5. In relation to these objectives, the Court described the relevant attributes of past cases in which it had found preemption: "In each of these cases, ERISA pre-empted state laws that mandated employee benefit structures or their administration. Elsewhere, we have held that state laws providing alternative enforcement mechanisms also relate to ERISA plans, triggering pre-emption." *Id.* at 658, 115 S.Ct. 1671.

see De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 814, 117 S.Ct. 1747, 138 L.Ed.2d 21 (1997); *Geweke Ford,* 130 F.3d at 1358.[6]

In its most recent foray, the Court retreated from this explicit purposive analysis and simply concluded that ERISA preempts California's agency law because of its "marked effect on plan administration." *UNUM Life Ins. Co. of Am. v. Ward,* 526 U.S. 358, 119 S.Ct. 1380, 1392, 143 L.Ed.2d 462 (1999).

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6. In one recent case, the Court analyzed the purposes of ERISA and the effect of the state laws in question through the prism of traditional "conflict preemption" principles rather than through a preemption analysis rooted in 29 U.S.C. § 1144(a). *See Boggs,* 520 U.S. at 841, 117 S.Ct. 1754; id. at 844, 117 S.Ct. 1754 ("Conventional conflict pre-emption principles require pre-emption 'where compliance with both federal and state regulations is a physical impossibility, . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " (quoting *Gade v. National Solid Wastes Management Assn.,* 505 U.S. 88, 98, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) (internal quotation marks and citation omitted))). The Court specifically avoided deciding whether ERISA's statute provided any further preemptive force than that present under the traditional preemption rules and whether traditional "field preemption" principles also apply. *See id.* at 841, 117 S.Ct. 1754; *but cf. John Hancock Mutual Life Ins. Co. v. Harris Trust & Savings Bank,* 510 U.S. 86, 99, 114 S.Ct. 517, 126 L.Ed.2d 524 (1993) ("We discern no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional preemption analysis."); *Dillingham,* 519 U.S. at 334-36, 117 S.Ct. 832 (Scalia, J., concurring) (stating that the Court's ERISA preemption jurisprudence can be explained under the traditional principles, which should be the only test).

Not surprisingly, our Circuit has not arrived upon a single, precise rule that universally determines whether ERISA preempts a state law. Since the Supreme Court decided *Travelers,* we have formulated several different, though compatible, tests in an effort to follow the Supreme Court in fulfilling the statutory mandate of broad preemption without intruding upon state laws beyond the intention of Congress and the objectives of ERISA.

In *Arizona State Carpenters Pension Trust Fund v. Citibank, (Arizona),* 125 F.3d 715, 722 (9th Cir.1997) [hereinafter "*Arizona State Carpenters*"], we relied on and supplemented a "relationship test" previously developed in *General Am. Life Ins. Co. v. Castonguay,* 984 F.2d 1518, 1522 (9th Cir.1993). Noting that "[t]here can be little doubt that Congress intended to sweep away any state law whose administration might interfere with or complicate the administration of ERISA" and that "the remedies Congress created were intended to be exclusive," *Arizona State Carpenters,* 125 F.3d at 722, we formulated a test emphasizing three traditional areas identified as preempted by the Supreme Court in *Travelers*: (1) "state laws that mandate . . . employee benefit structures or their administration"; (2) "state laws that bind employers or plan administrators to particular choices or preclude uniform administrative practice, thereby functioning as a regulation of an ERISA plan itself"; and (3) "state laws providing alternate enforcement mechanisms for employees to obtain ERISA plan benefits." *Id.* at 723 (quoting *Coyne & Delany Co. v. Selman,* 98 F.3d 1457 (4th Cir.1996)) (citations and

internal quotation marks omitted). We concluded that "[1] where state law claims fall outside [these] three areas of concern identified in *Travelers,* [2] arise from state laws of general application, [3] do not depend upon ERISA, and [4] do not affect the relationships between the principal ERISA participants[,] the state law claims are not preempted." *Id.* at 724.

A similar "relationship" approach can be seen in *Geweke Ford,* in which we reiterated *Castonguay's* statement that "[a] state law claim is preempted if it 'encroaches on the relationships regulated by ERISA.' " *Geweke Ford,* 130 F.3d at 1358 (quoting *Castonguay,* 984 F.2d at 1522). "ERISA does not preempt regulation of those relationships 'where a plan operates just like any other commercial entity [-] for instance the relationship between the plan and its own employees, or the plan and its insurers or creditors.' Under *Castonguay,* the key issue is whether the parties' relationships are *ERISA-governed relationships.*" *Geweke Ford,* 130 F.3d at 1358 (citation omitted) (emphasis added).[7]

In a subsequent case, *Operating Eng'rs Health & Welfare Trust Fund v. JWJ Contracting Co.,* 135 F.3d 671 (1998) [hereinafter "*Operating Eng'rs*"], we made clear that the multi-pronged test in *Arizona State Carpenters* was not the exclusive guide for the Circuit. In *Operating Eng'rs,* we emphasized the continued applicability of the factors developed in another of our earlier cases, *Aloha Airlines, Inc. v. Ahue,* 12 F.3d 1498, 1504 (9th Cir.1993). We wrote:

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7. After concluding that preemption does not apply, we described "our holding [as] consistent with" *Arizona State Carpenters. Geweke Ford,* 130 F.3d at 1360.

Appendix A

To aid in determining whether a state law is connected with an ERISA benefit plan, this court has identified the following factors:

> (1) whether the state law regulates the types of benefits of ERISA employee welfare benefit plans;
>
> (2) whether the state law requires the establishment of a separate employee benefit plan to comply with the law;
>
> (3) whether the state law imposes reporting, disclosure, funding, or vesting requirements for ERISA plans; and
>
> (4) whether the state law regulates certain ERISA relationships, including the relationships between an ERISA plan and employer and, to the extent an employee benefit plan is involved, between the employer and employee.

Operating Eng'rs, 135 F.3d at 678 (quoting *Aloha Airlines, Inc.* 12 F.3d at 1504 (9th Cir.1993) (citations omitted and formatting added)). Recently, we have continued to apply these factors. *See McBride v. PLM Int'l, Inc.,* 179 F.3d 737, 745 (9th Cir.1999).[8]

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8. In *Operating Eng'rs,* we also described favorably a short-hand formulation we had used before *Travelers* was decided:

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Elsewhere, we have placed the *Aloha Airlines* factors as one element of a greater, overarching test that focuses on the application of traditional non-ERISA-specific preemption principles:

> Under this approach we ask first whether application of California law would conflict with ERISA. *See Boggs v. Boggs,* 520 U.S. 833, 117 S.Ct. 1754, 1760, 138 L.Ed.2d 45 (1997). This is itself a two-step analysis in which we ask (1) whether California law conflicts with any specific provision of ERISA and then (2) whether application of California law would frustrate Congress' purposes in enacting ERISA. Having proceeded through the conflict analysis, we ask next whether Congress has indicated an intent to occupy the field so completely that California law is necessarily preempted. *See id.* 520 U.S. at 841, 117 S.Ct. at 1760; *Dillingham,* 117 S.Ct. at 843 (Scalia, J., concurring).

See Emard, 153 F.3d at 957. The *Aloha Airlines* factors, we wrote, were part of the process of determining whether a

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> Is the state telling employers how to write their ERISA plans, or conditioning some requirement on how they write their ERISA plans? Or is it telling them that regardless of how they write their ERISA plans, they must do *something else outside and independently* of the ERISA plans? If the latter . . . there is no preemption.

Operating Eng'rs, 135 F.3d at 679 (citation and internal quotation marks omitted) (emphasis added) (ellipsis in original).

state law "would frustrate Congress' purposes." *See id.* at 958.[9]

Most recently, in *Blue Cross of Cal. v. Anesthesia Care Assocs. Med. Group, Inc.*, 187 F.3d 1045 (9th Cir.1999), we again returned to the concept of "relationship" in *Castonguay*, but supplemented it in a manner different from our analysis in *Arizona State Carpenters*. We wrote:

> [S]ubsequent to *Travelers*, *De Buono*, and *Dillingham Construction*, we have continued to rely on a "relationship" test to determine the scope of ERISA's express preemption clause, a test formulated in *General Am. Life Ins. Co. v. Castonguay*, 984 F.2d 1518, 1521-22 (9th Cir.1993). *See, e.g., Geweke Ford*, 130 F.3d at 1358. . . . Under this test, we look to whether the state law encroaches on relationships regulated by ERISA, such as between plan and plan member, plan and employer, and plan and trustee.

Id. at 1053. We analyzed the issue from the perspective of ERISA's purposes, concluding that the purposes of ERISA preemption, as explained by *Travelers*, did not apply because "[t]he state law . . . does not create an alternative enforcement mechanism for securing benefits under the terms of ERISA-covered plans" and "the economic effects that the

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9. We also addressed the subject of "field preemption" and concluded that "[i]n enacting ERISA, Congress intend to occupy the field of regulation of employee welfare and pension benefit plans. This occupation is complete, however, only as to regulation of ERISA plans as plans." *Id.* at 961.

. . . claims might have on the plans does not imply that the claims interfere with the field of benefits law that Congress sought to occupy with ERISA." *Id.* at 1054; *cf. Washington Physicians Service Ass'n v. Gregoire,* 147 F.3d 1039, 1043 (9th Cir.1998) ("The Court has since elaborated that in determining whether a 'connection' exists between a state law and an ERISA plan, courts must consider whether the law requires particular benefit structures or imposes administrative burdens on a plan." (citing *Travelers*)), *cert. denied,* __ U.S. __, 119 S.Ct. 1033, 143 L.Ed.2d 42 (1999).

We decline to develop our own test describing the outer bounds of ERISA preemption, or to determine in every particular how these varied formulations from recent cases fit together. The resolution of the case before us does not require it. Instead, we observe only that under each test, a core factor leading to the conclusion that a state law claim is preempted is that the claim bears on an ERISA-regulated relationship. *See Blue Cross of Cal.,* 187 F.3d at 1053 ("[W]e look to whether the state law encroaches on relationships regulated by ERISA. . . ."); *Emard,* 153 F.3d at 957 (In determining whether state law would "frustrate the purposes" of the statute, a factor is the existence of state-law regulation of ERISA relationships.); *Operating Eng'rs,* 135 F.3d at 678 (A preemption factor is "whether the state law regulates certain ERISA relationships . . . ." (quoting *Aloha Airlines, Inc.* (internal quotation marks omitted))); *Geweke Ford,* 130 F.3d at 1358 ("A state law claim is preempted if it 'encroaches on the relationships regulated by ERISA.' " (quoting *Castonguay*)); *see also Arizona State Carpenters,* 125 F.3d at 724 (holding that there is no preemption where,

inter alia, the state laws "do not affect the relationships between the principal ERISA participants").

iii.

In deciding the motion to remand, the district court focused on one such ERISA-governed relationship: the relationship established by ERISA § 404, which imposes upon plan fiduciaries a duty to discharge their duties "solely in the interests of the participants and beneficiaries" and "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use. . . ." 29 U.S.C. § 1104(a)(1)(B). A person or entity is considered a fiduciary with respect to a plan to the extent that:

> (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A).

The district court determined that Seyfarth was not an ERISA fiduciary, relying on our decision in *Yeseta,* in which we fleshed out the contours of § 1002(21)(A) and held that

"an attorney rendering legal and consulting advice to a plan" will not be deemed a fiduciary unless she exercises authority over the plan "in a manner other than by usual professional function" and, therefore, she is not susceptible to an ERISA lawsuit for breach of fiduciary duty. *Yeseta*, 837 F.2d at 385 (citing 29 C.F.R. § 2509.75-5 (1986)). We have since reaffirmed this rule, *see Nieto v. Ecker*, 845 F.2d 868, 871 (9th Cir.1988), which also applies to professionals other than attorneys, *see Yeseta*, 837 F.2d at 385 (accountant); *Arizona State Carpenters*, 125 F.3d 715, 721-22 (9th Cir.1997) (bank providing custodial and depository services); *accord Painters of Philadelphia Dist. Council No. 21 Welfare Fund v. Price Waterhouse*, 879 F.2d 1146, 1150 (3d Cir.1989) (holding that an auditing firm that reviewed information provided by others who actually controlled assets was not a fiduciary); *O'Toole v. Arlington Trust Co.*, 681 F.2d 94, 96 (1st Cir.1982) (holding that a bank that acted merely as a depository for a trust fund and whose responsibility did not include "discretionary advisory activities" was not a fiduciary).

Under the weight of this authority, the district court held that because Seyfarth had performed traditional attorney services for the plans, Seyfarth was not a fiduciary under ERISA and was not subject to a cause of action under ERISA for breach of fiduciary duty. Therefore, the court ruled that ERISA preemption did not apply. The district court premised its remand order and subsequent award of attorneys' fees and costs on this ruling. We conclude that the district court accurately interpreted our cases with respect to relationships of fiduciary duty under ERISA § 404. Under our ERISA jurisprudence, however, we cannot rest on this conclusion but are compelled to consider whether another ERISA-

governed relationship, independent of the ERISA-created fiduciary relationship, has preemptive force.

Our cases have recognized that ERISA creates a separate cause of action against *non*-fiduciaries who are "parties in interest"[10] and who engage in "prohibited transactions" under ERISA §§ 406 and 408, 29 U.S.C. §§ 1106(a), 1108(b).[11]

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10. ERISA defines a "party in interest" as one who "provid[es] services" to an ERISA plan. 29 U.S.C. § 1002(14)(B).

11. ERISA section 406(a)(1) provides:

> Except as provided in section 1108 of this title:
>
> (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —
>
> . . . . .
>
> (C) furnishing of goods, services, or facilities between the plan and a party in interest;
>
> . . . . .

29 U.S.C. § 1106(a)(1). ERISA section 408(b) provides:

> The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions:
>
> . . . . .

(Cont'd)

See Nieto, 845 F.2d at 873. In *Nieto,* we examined the scope of the ERISA civil remedies provision, ERISA § 502, which provides in part that "[a] civil action may be brought — by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan. . . ." 29 U.S.C. § 1132(a)(3). We concluded that under this section a beneficiary or plan participant may bring suit for equitable relief against a *non*-fiduciary who is a party in interest to a plan if that party has engaged in transactions prohibited by ERISA §§ 406(a) and 408(b). *See Nieto,* 845 F.2d at 873. We have since reaffirmed the existence of this basis for relief, *see Landwehr v. DuPree,* 72 F.3d 726, 733 (9th Cir.1995), and other courts have held likewise, *see, e.g., LeBlanc v. Cahill,* 153 F.3d 134, 152-53 (4th Cir.1998) (citing *Nieto* with approval and finding a cause of action under § 406 against non-fiduciaries for prohibited transactions); *Herman v. South Carolina Nat'l Bank,* 140 F.3d 1413, 1421 (11th Cir.1998) (citing *Nieto* and

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> (2) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.
>
> . . . . .

29 U.S.C. § 1108(b).

holding that ERISA §§ 406 and 502(a)(5) permit a cause of action by the Secretary of Labor against a party in interest involved in prohibited transactions), *cert. denied,* __ U.S. __, 119 S.Ct. 1030, 143 L.Ed.2d 40 (1999); *cf. Lockheed Corp. v. Spink,* 517 U.S. 882, 889 n. 3, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996) (explicitly not deciding whether a cause of action exists against a party in interest for prohibited transactions).

In *Nieto,* we established that parties in interest include attorneys who provide legal services to an ERISA plan. *See Nieto,* 845 F.2d at 873. We held that prohibited transactions in violation of ERISA §§ 406(a)(1) and 408(b) include the *receipt of excessive compensation for legal services* rendered to an ERISA plan. *See id.*; 19 U.S.C. § 1108(b) (contract for legal services prohibited unless "no more than reasonable compensation is paid therefor"); *Concha v. London,* 62 F.3d 1493, 1504 (9th Cir.1995), *cert. dismissed,* 517 U.S. 1183, 116 S.Ct. 1710, 134 L.Ed.2d 772 (1996). This is the very allegation underlying Rutledge's state court complaint, for charges for legal services in excess of the contractually agreed-upon rate are "excessive compensation" and "more than reasonable" within the meaning of § 408(b).

In *Concha v. London,* we held that state-law claims against a non-fiduciary for prohibited transactions "relate to the administration of a plan covered by ERISA" and are preempted. *Concha,* 62 F.3d at 1504. The soundness of this holding can be seen when considered in the light of our purposive and relationship-focused approach to preemption. In its enumeration of prohibited transactions, ERISA precisely defines the relationship between plans and parties

in interest. This reveals an "ERISA-governed relationship," *Geweke Ford,* 130 F.3d at 1358, with regard to the rates charged by lawyers to plans. By introducing the possibility of inconsistent substantive and procedural rules with regard to excessive fees, state law claims can be deemed to have a "marked effect on plan administration," *UNUM Life Ins. Co. of Am.,* 526 U.S. 358, 119 S.Ct. 1380, 1392, 143 L.Ed.2d 462 (1999); by duplication, a state law cause of action concerning excessive fees contravenes the principle that "the remedies Congress created were intended to be exclusive," *Arizona State Carpenters,* 125 F.3d at 722. The prohibited transactions provision serves ERISA's purposes by protecting a plan's participants and beneficiaries from a depletion of plan assets through shady, inside deals and by providing a consistent rule of reasonableness governing fees for services across jurisdictions. *See Boggs,* 520 U.S. at 845, 117 S.Ct. 1754 (stating that "[t]he principal object of the statute [ERISA] is to protect plan participants and beneficiaries"); *Travelers,* 514 U.S. at 657, 115 S.Ct. 1671 (concluding that "[t]he basic thrust of the pre-emption clause [is] to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans"). The state law claim interferes with this carefully spelled-out relationship by providing an alternative route for beneficiaries and participants to rectify excessive fees. *See id.* at 658, 115 S.Ct. 1671 ("[W]e have held that state laws providing alternative enforcement mechanisms also relate to ERISA plans, triggering pre-emption.").

Rutledge's claims bear upon the ERISA-governed relationship between Seyfarth and the Plans. The claims are addressed to Seyfarth's actions in exactly the capacity

regulated by the statute. In contrast, in *Blue Cross of Cal.*, in which we found no preemption despite the presence of a claim against a fiduciary, we wrote: "The . . . claims concern only promises that Blue Cross made as a health care plan provider to its participating physicians. They do not touch on Blue Cross' fiduciary status, or any claims that a beneficiary may make against Blue Cross in that capacity." *Blue Cross of Cal.*, 187 F.3d at 1054. Similarly, in *Arizona State Carpenters*, we concluded that "[a]s a service provider offering nonfiduciary custodial services, Citibank's relationship with the Trust Funds was no different from that between Citibank and any of its customers," *Arizona State Carpenters*, 125 F.3d at 724, in the context of a suit for "breach of [a] custodial agreement through Citibank's failure to notify the Trustees of defaults on interest and principal payments on investments the investment manager made on behalf of the Trust Funds," *id.* at 719. If Citibank had been charging "more than reasonable" fees, it would have been liable as a party in interest under the reasoning of *Nieto*; however, the claim was for inadequate or improper performance and so failed to implicate the "prohibited transaction" provisions. *See* 29 U.S.C. 1108(b)(2) (requiring that parties in interest and fiduciaries "make reasonable arrangements for . . . services" and that "no more than reasonable compensation [be] paid").[12]

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12. Similarly, if Rutledge were suing Seyfarth on the grounds that Seyfarth had committed legal malpractice by providing *substandard service*, we might find no ERISA-governed relationship at issue in the case before us. However, in the circumstances of *this* case, ERISA §§ 406 and 408 *do* explicitly govern the relationship between the lawyers and the ERISA plans in the respect here at

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Because the allegation at issue in the state law claims — that Seyfarth charged legal fees to the Plans in excess of an amount agreed upon by the parties — is precisely the sort of prohibited transaction governed by ERISA, we hold in accord with *Concha* that the claims are preempted.[13]

iv.

As discussed above, it is also clear that ERISA's civil enforcement provision provides a cause of action for claims of excessive compensation. *See, e.g., Nieto,* 845 F.2d at 873. Therefore, because the state law claims are both

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(Cont'd)
issue — excessive fees. Therefore, unlike in *Blue Cross of Cal.,* Rutledge's claims precisely "touch on" the relevant ERISA relationship, and unlike the bank in *Arizona State Carpenters,* legal service providers *do* relate to the Plans in a manner different from their relation to other clients — i.e., they relate to them under the governance of ERISA §§ 406 and 408.

13. Rutledge asserts that his claims could not be subject to ERISA preemption because he sought monetary damages, including punitive damages, and because the civil enforcement provision provides for only equitable relief. This argument fails, for we recently held that the unavailability of a particular remedy does not undermine ERISA preemption. *See Bast v. Prudential Ins. Co. of Am.,* 150 F.3d 1003, 1010 (9th Cir.1998). In *Bast,* we stated that "ERISA preempts state law claims, even if the result is that a claimant, relegated to asserting a claim only under ERISA, is left without a remedy. The focus is on ERISA. If it does not provide a remedy, none exists." *Id.*; *see also Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 55, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) (noting that preemption may displace state law claims even when the state law authorizes a remedy unavailable under the federal provision).

"preempt[ed]" and "displace[d]," the state law claims are *completely* preempted, allowing removal despite the well-pleaded complaint rule. *See Emard,* 153 F.3d at 953.

III

Having waded into the "veritable Sargasso Sea of obfuscation" that is ERISA preemption law, *Toumajian,* 135 F.3d at 654 n. 3 (quoting *Travelers Ins. Co. v. Cuomo,* 14 F.3d 708, 717 (2d Cir.1993), *rev'd sub nom. New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995)), we reject the legal determination on which the district court based its award of fees. Applying abuse-of-discretion review, we must therefore reverse the district court's award. *See Moore,* 981 F.2d at 447; *accord Suder v. Blue Circle, Inc.,* 116 F.3d 1351, 1352 (10th Cir.1997) (holding that a fee award is appropriate only where "removal was improper *ab initio*"); *Miranti v. Lee,* 3 F.3d 925, 928 (5th Cir.1993) (holding that "the propriety of the defendant's removal continues to be central in determining whether to impose fees").

For the foregoing reasons, we reverse the judgment of the district court.[14]

REVERSED.

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14. We deny Seyfarth's motion for judicial notice as moot.

APPENDIX B — ORDER AND AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND AMENDED APRIL 5, 2000

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-15298
D.C. No. CV-97-03633-VRW

ANTHONY RUTLEDGE, an individual on his own behalf and beneficiaries of the Hotel Union and Hotel Industry of Hawaii Pension Trust; AFL HOTEL AND RESTAURANT WORKERS' HEALTH AND WELFARE FUND,

Plaintiffs-Appellees,

v.

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, a California Law Partnership; MITCHELL WHITEHEAD, an individual,

Defendants-Appellants.

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding

Argued and Submitted
March 9, 1999 — San Francisco, California

Appendix B

Filed January 12, 2000
Amended April 5, 2000

Before: Diarmuid F. O'Scannlain and
Kim McLane Wardlaw, Circuit Judges, and
Wm. Matthew Byrne, Jr.,[1] District Judge.

ORDER

The Opinion filed January 12, 2000, slip op. 403, is amended as follows:

1. At slip op. 425, in the final sentence of the first full paragraph, change

> Because the allegation at issue in the state law claims — that Seyfarth charged legal fees to the Plans in excess of an amount agreed upon by the parties — is precisely the sort of prohibited transaction governed by ERISA, we hold in accord with *Concha* that the claims are preempted.

to

> In evaluating the underlying remand order for the purpose of

1. The Honorable Wm. Matthew Byrne, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

reviewing the district court's grant of attorneys' fees, we conclude that the allegation at issue in the state law claims — that Seyfarth charged legal fees to the Plans in excess of an amount agreed upon by the parties — is the sort of prohibited transaction governed by ERISA. Accordingly, the district court erred in finding that the claims were not preempted. *See Concha*, 62 F.3d at 1504.

2. At slip op. 408, in the first sentence of the first paragraph, delete the comma after "Fairweather"

3. At slip op. 408, in the first sentence of the second paragraph, change "&" to "and"

4. At slip op. 416, in the sentence crossing over from the previous page, change

> "[1] where state law claims fall outside"

to

> "where state law claims [1] fall outside"

With these amendments, the panel has voted unanimously to deny the petition for rehearing. Judge O'Scannlain and Judge Wardlaw have voted to reject the

suggestion for rehearing en banc and Judge Byrne so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C — TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED DECEMBER 19, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NO. C-97-03633-VRW

BEFORE THE HONORABLE VAUGHN R. WALKER

ANTHONY RUTLEDGE, AN INDIVIDUAL ON HIS OWN BEHALF AND BENEFICIARIES OF THE HOTEL UNION AND HOTEL INDUSTRY OF HAWAII PENSION TRUST; AND AFL HOTEL & RESTAURANT WORKERS' HEALTH AND WELFARE TRUST FUND,

PLAINTIFFS,

VS.

SEYFARTH, SHAW, FAIRWEATHER, AND GERALDSON, A LAW PARTNERSHIP; MICHAEL WHITEHEAD, AND INDIVIDUAL; AND DOES 1-50,

DEFENDANTS.

SAN FRANCISCO, CALIFORNIA

FRIDAY, DECEMBER 19, 1997,
10:30 O'CLOCK A.M.

TRANSCRIPT OF PROCEEDINGS

* * *

Appendix C

[3] **DECEMBER 19, 1997 10:30 O'CLOCK A.M.**

PROCEEDINGS

THE CLERK: CALLING CIVIL 97-3633, ANTHONY RUTLEDGE VERSUS SEYFARTH, SHAW, FAIRWEATHER AND GERALDSON, ET AL.

COUNSEL, PLEASE STEP FORWARD AND STATE YOUR APPEARANCES FOR THE RECORD.

MR. ASHE: GOOD MORNING, YOUR HONOR. BRIAN ASHE FOR SEYFARTH, SHAW, FAIRWEATHER & GERALDSON.

THE COURT: GOOD MORNING.

MR. KORNHAUSER: GOOD MORNING, YOUR HONOR. SAMUEL KORNHAUSER FOR THE PLAINTIFFS.

THE COURT: MR. KORNHAUSER.

MR. ASHE, WHAT SERVICES WAS THE SEYFARTH FIRM TO PERFORM UNDER ITS CONTRACT WITH THE PLAINTIFF?

MR. ASHE: YOUR HONOR, SEYFARTH, SHAW WAS IN A RELATIONSHIP WITH THE PLAN ADMINISTRATORS, THE TRUSTEES, AS THEIR CONFIDENTIAL COUNSEL, ASSISTED THE TRUSTEES IN THE ADMINISTRATION OF THE PLAN.

THEY ASSISTED THE TRUSTEES IN THE ADMINISTRATION OF THE PLAN BY GIVING THEM COUNSEL AS TO THE APPLICATION FOR AND GUIDED THEIR DECISIONS AND SO FORTH. THIS WAS A VERY DIFFERENT RELATIONSHIP THAN AN INSURER TO THE PLAN. THIS WAS INSIDE THE PLAN, SO TO SPEAK.

[4] WE HAVE THE EAR OF THE COUNSEL THAT GUIDED THE ADMINISTRATORS. THAT'S WHY THIS CASE IS DIFFERENT THAN THE CASES REPLIED UPON BY MR. RUTLEDGE AND HIS COUNSEL. WE'RE NOT A TYPICAL SERVICE PROVIDER. WE'RE A CONFIDENTIAL. WE ARE A VERY CLOSE INSIDE SERVICE PROVIDER. THAT IF THIS IS ALLOWED TO GO FORWARD ON STATE LAW CAUSES OF ACTION WILL DIRECTLY AFFECT THE RELATIONSHIP AND THE ADMINISTRATION OF THE PLAN BECAUSE THE PEOPLE GUIDING THE PLAN ADMINISTRATORS, THEY ARE ACTUALLY COUNSELLING THEM CONFIDENTIALLY AS ATTORNEY/CLIENT WILL HAVE THAT RELATIONSHIP IMPACTED.

THE COURT: THAT SOUNDS TO ME LIKE AN ATTORNEY/CLIENT RELATIONSHIP IN THAT WHAT THE FIRM WAS TO DO FOR THE PLAINTIFF WAS TO PROVIDE LEGAL SERVICES, ATTORNEY SERVICES; IS THAT NOT CORRECT?

MR. ASHE: IT'S ABSOLUTELY NOT CORRECT, YOUR HONOR.

THE COURT: WHY NOT?

MR. ASHE: MR. RUTLEDGE IS SUING SEYFARTH, SHAW AS A PLAN BENEFICIARY AND WE HAVE NO — WE WERE NOT HIRED TO COUNSEL MR. RUTLEDGE AS PLAN BENEFICIARY. WE WERE HIRED TO COUNSEL PLAN ADMINISTRATORS.

THE COURT: NO. NO. NO. I WANT YOU TO FOCUS ON THE SERVICES TO BE PROVIDED. AND YOU'VE DESCRIBED THOSE AS CONFIDENTIAL, ADVISORY SERVICES DEALING WITH THE [5] APPLICATION OF THE ERISA STATUTE.

MR. ASHE: RIGHT.

THE COURT: AND THE REGULATIONS UNDER ERISA.

MR. ASHE: AND THE LOSSES.

THE COURT: THAT SOUNDS VERY MUCH LIKE ATTORNEY SERVICES, DOESN'T IT?

MR. ASHE: YES, SIR, IT DOES, YOUR HONOR.

THE COURT: AND ISN'T IT ATTORNEY SERVICE?

MR. ASHE: YES.

THE COURT: AND IF IT IS ATTORNEY SERVICES THEN IS THERE A BASIS UPON WHICH ERISA APPLIES?

MR. ASHE: CERTAINLY, YOUR HONOR.

THE COURT: TO SUPPORT A REMOVAL?

MR. ASHE: YES, YOUR HONOR.

THE COURT: AND WHAT IS THAT?

MR. ASHE: THE NINTH CIRCUIT HAS HELD CERTAINLY THE *ARIZONA STATE CARPENTERS* CASE, 1997 CASE. AND, IN FACT, IN THE CASE SUBMITTED BY MR. RUTLEDGE'S COUNSEL, THE *GEWEKE FORD* CASE, THAT ERISA PREEMPTS, AN ERISA PREEMPTION OCCURS WHEN STATE LAW IS USED TO EFFECT THE UNIFORM ADMINISTRATION OF A PLAN OR STATE LAW IS USED TO EFFECT THE PLAN ADMINISTRATOR'S PRACTICES UNDER THE PLAN.

AND THAT'S EXACTLY WHAT THIS CASE IS ALL ABOUT. IF THE STATE LAW CLAIMS ATTACKING OUR FEE PLAN IS ALLOWED TO PROCEED, IT WILL NECESSARILY AFFECT THE RELATIONSHIP [6] BETWEEN THE ADMINISTRATORS OF THE PLAN AND THEIR CHOSEN COUNSEL ADVERSELY, YOUR HONOR.

AND THAT'S THE PREEMPTION OF THE — OR EXCUSE ME. THE ERISA WAS FORMED TO REGULATE RELATIONSHIPS, YOUR HONOR. THIS RELATIONSHIP WILL BE DIRECTLY EFFECTING THE PLAN ADMINISTRATORS IF IT'S EFFECTED THROUGH THE FIDUCIARY CLAIMS AND THE STATE LAW BREACH OF CONTRACT CLAIMS.

Appendix C

THE COURT: ALL RIGHT. LET ME ASK YOU. WAS THE SEYFARTH FIRM TO PROVIDE MANAGEMENT OF THE PLAN?

MR. ASHE: NO.

THE COURT: WAS THE SEYFARTH FIRM TO EXERCISE AUTHORITY OR TO CONTROL THE MANAGEMENT OR DISPOSITION OF THE PLAN'S ASSETS?

MR. ASHE: IT WAS HIRED TO COUNSEL THE PEOPLE DOING THAT, DIRECTLY COUNSEL THE PEOPLE DOING THAT.

THE COURT: ALL RIGHT. TO COUNSEL THE PEOPLE DOING THAT, BUT NOT TO DO THAT?

MR. ASHE: CORRECT

THE COURT: ALL RIGHT. WAS THE SEYFARTH FIRM ENGAGED TO RENDER INVESTMENT ADVICE?

MR. ASHE: NOT TO MY KNOWLEDGE, YOUR HONOR, ALTHOUGH THEY DID OVERSEE AND GUIDE THE ADMINISTRATORS OF THE PLAN IN DOING THAT DIRECTLY.

THE COURT: ALL RIGHT. AGAIN, TO COUNSEL AND TO ADVISE.

[7] MR. ASHE: YES.

Appendix C

THE COURT: BUT NOT TO PERFORM THOSE SERVICES, CORRECT?

MR. ASHE: CORRECT.

THE COURT: AND WAS THE SEYFARTH FIRM ENGAGED TO ADMINISTER THE PLAN?

MR. ASHE: THAT'S A VERY BROAD TERM, AND WITHIN SOME ASPECTS OF IT WE HAD A DIRECT HAND IN ADMINISTERING THE PLAN.

THE COURT: AND HOW SO?

MR. ASHE: BY, AGAIN, YOUR HONOR, BY HAVING A CONFIDENTIAL, ONGOING AND VERY FIRM RELATIONSHIP WITH THE ADMINISTRATORS OF THE PLAN AND GUIDING THEM IN THE ADMINISTRATION OF THE PLAN, DIRECTLY GIVING THEM COUNSEL FOR THEIR DECISIONS.

THE COURT: TO ADVISE AND TO COUNSEL THOSE WHO WERE CHARGED WITH THE RESPONSIBILITY TO ADMINISTER THE PLAN?

MR. ASHE: YES, YOUR HONOR.

THE COURT: ALL RIGHT. NOW, OBVIOUSLY TO ADVISE AND TO COUNSEL SOMEONE WITH RESPONSIBILITIES EITHER TO ADMINISTER THE PLAN OR TO MANAGE ITS ASSETS OR TO DISPOSE OF ITS ASSETS, THAT IS DIFFERENT, ISN'T IT —

MR. ASHE: YOUR HONOR —

THE COURT: — FROM ACTUALLY DOING THOSE THINGS?

[8] MR. ASHE: IF THAT RELATIONSHIP IS UPSET, I CAN ASSURE YOU THAT THE ACTUAL ADMINISTRATION OF THE PLAN WILL ALSO BE UPSET. IF SEYFARTH'S RELATIONSHIP WITH THE PLAN TRUSTEES IS ALLOWED TO BE AFFECTED SUCH THAT WE'RE NOT BEING PAID OUR BILLS BECAUSE THE PLAN BENEFICIARY WANTS TO TRY TO WEDGE BETWEEN THE TRUSTEES AND THE FIRM FOR A DIFFERENT AGENDA THAT'S NOT BEFORE YOU, THE RELATIONSHIP AND THE ADMINISTRATION OF THE PLAN WILL BE DIRECTLY AFFECTED.

THE COURT: WELL, I'M QUITE FAMILIAR THAT WHEN BILLS ARE NOT MADE IT USUALLY LEADS TO TROUBLE.

MR. ASHE: YES.

THE COURT: BUT THE POINT WE'RE ATTEMPTING TO DEAL WITH HERE IS THE NATURE OF THE SERVICES THAT ARE TO BE PROVIDED. AND IT DOES NOT APPEAR FROM WHAT YOU HAVE SAID AND WHAT APPEARS IN THE RECORD THAT YOUR FIRM WAS ENGAGED IN MANAGEMENT OF THE PLAN, THE MANAGEMENT OR DISPOSITION OF THE PLAN ASSETS OR THE ADMINISTRATION OF THE PLAN.

AND THAT WOULD SEEM TO ME TO PLACE YOUR SERVICES IN THE CATEGORY OF GARDEN VARIETY LAWYER SERVICES, NOT SUBJECT TO ERISA.

MR. ASHE: YOUR HONOR, AGAIN, I WOULD DRAW YOUR ATTENTION TO THE NINTH CIRCUIT HOLDING THAT PREEMPTION DOES OCCUR WHEN A STATE LAW CLAIM IS USED TO AFFECT THE ADMINISTRATIVE PRACTICES OR TO EFFECT THE PLAN [9] ADMINISTRATOR'S CHOICE OF ADMINISTRATIVE PRACTICES.

IN THIS CASE, STATE LAW CLAIMS ARE BEING USED TO DRIVE A WEDGE BETWEEN THE ADMINISTRATORS OF THE PLAN AND THE LAW FIRM THAT HELPED GUIDE THE ADMINISTRATORS OF THE PLAN.

IF THE WEDGE IS ALLOWED TO OCCUR THERE WILL BE A DIRECT EFFECT ON THE ADMINISTRATION OF THE PLAN. AS SUCH, THERE IS ERISA PREEMPTION. THIS DOES AFFECT A RELATIONSHIP THAT IS GOVERNED BY ERISA.

BEYOND THAT, YOUR HONOR, THERE IS NO CASE BEFORE YOU OR THAT IS KNOWN TO MY FIRM THAT ALLOWS A PLAN BENEFICIARY TO COME IN AND DRIVE THIS WEDGE BETWEEN THE TRUSTEES AND THE TRUSTEES' CHOSEN COUNSEL.

IF THAT SORT OF LAW IS ALLOWED THEN ANY PLAN BENEFICIARY CAN COME IN AND GRIPE

ABOUT THE COLOR OF THE CARPET IN THE TRUSTEES' MEETING ROOM BECAUSE THEY HELPED PAY FOR THAT CARPET IN SOME WAY, SHAPE OR FORM.

THERE'S NO CASE THAT STANDS FOR THAT PROPOSITION THAT THEY CAN JUST COME IN AT ANYTIME WHEN THEY DISAGREE WITH THE PLAN ADMINISTRATOR'S CHOICE OF VENDORS AND ATTACK THE RELATIONSHIP BETWEEN THEM, FOR TO DO SO UNDERMINES THE ADMINISTRATOR'S RUNNING OF THE PLAN AND, THEREFORE, TRIGGERS ERISA.

THE COURT: ALL RIGHT.

MR. ASHE: THANK YOU.

[10] THE COURT: MR. ASHE. MR. KORNHAUSER?

MR. KORNHAUSER: YES, YOUR HONOR.

THE COURT: WHAT ARE YOUR VIEWS ON THESE THINGS THAT I HAVE BEEN DISCUSSING WITH MR. ASHE?

MR. KORNHAUSER: I AGREE WITH YOUR HONOR.

THE COURT: WELL, I HAVEN'T ANNOUNCED WHAT MY CONCLUSIONS ARE YET.

MR. KORNHAUSER: WELL, I AGREE THAT THEY ARE GARDEN VARIETY ATTORNEY/CLIENT

SERVICES. THERE'S NO ADMINISTRATION OF THE PLAN. WHAT THESE PEOPLE WERE DOING JUST LIKE INSURANCE PROVIDER OR ANY THIRD-PARTY SERVICE PROVIDER, THEY PROVIDE ADVICE, COUNSEL, SUGGESTIONS TO THE TRUSTEES. THE TRUSTEES ARE THE ONES THAT ADMINISTER THE PLAN. THE INVESTMENT ADVISOR IS THE ONE THAT MANAGES THE ASSETS OF THE PLAN.

SEYFARTH WAS ATTORNEYS. THEY TOOK THEIR DIRECTIONS FROM THE TRUSTEES. THEY PROVIDED ADVICE, BUT THAT WAS IT. THE TRUSTEES WERE THE ONES THAT ADMINISTERED THE PLAN.

SO AS YOUR HONOR SAID THERE WASN'T — THIS DOES NOT COME WITHIN THE PREEMPTION OF ERISA BECAUSE SEYFARTH FIRM WASN'T A PLAN ADMINISTRATOR. I MEAN, AND I THINK THE CASE LAW — THE RECENT NINTH CIRCUIT CASE LAW IS AS CLEAR AS A BELL.

THE *ARIZONA CARPENTERS'* CASE THEY RELY ON, SAME [11] SITUATION. THIRD-PARTY SERVICE PROVIDER. YOU HAD SOMEBODY THAT WAS ACTUALLY MUCH CLOSER TO ADMINISTERING THE PLAN. THAT WAS CITIBANK.

—I MEAN, THEY WERE THE CUSTODIAN. THEY WERE HANDLING THE FUNDS. THEY WERE ACTUALLY DISBURSING THE FUNDS AND DOING ALL THE ACTIVITIES SUBJECT TO THE DIRECTION OF THE TRUSTEES.

Appendix C

AND THE COURT STILL HELD THAT THOSE PEOPLE WERE — THAT THE BANK WAS NOT AN ADMINISTRATOR.

THE COURT: WELL, WHAT'S YOUR RESPONSE TO MR. ASHE'S ARGUMENT THAT THE NATURE OF THE RELATIONSHIP HERE IS ONE OF SUCH SENSITIVITY AND CONFIDENTIAL CHARACTER THAT TO DEAL WITH THESE ISSUES OUTSIDE THE ERISA CONTEXT, BUT RATHER IN THE COMMON LAW CONTEXT WOULD DRIVE A WEDGE BETWEEN THE CONFIDENTIAL ADVISOR AND THE PLAN ADMINISTRATOR?

MR. KORNHAUSER: WELL, I MEAN THAT IS NOT TRUE. NOBODY'S ASKING TO REMOVE SEYFARTH, NUMBER ONE. NUMBER TWO, THE PLAN IS GOING TO GO AHEAD AND BE ADMINISTERED. IF THE TRUSTEES WANT TO GET RID OF THEIR COUNSEL — AND WE HAVEN'T SUGGESTED THEY DO — BUT IF THEY WANTED TO THEY CAN DO THAT. THEY CAN DROP THEM AT ANYTIME. THAT DOESN'T AFFECT THE ADMINISTRATION OF THE PLAN.

THE PLAN IS GOING ON. IT CONTINUES TO FUNCTION. IT'S BEEN FUNCTIONING AND SEYFARTH HAS BEEN CONTINUING TO [12] PROVIDE LEGAL ADVICE TO THE PLAN WHILE THIS LAWSUIT IS GOING ON. AND THEY CAN CHOOSE TO CONTINUE TO DO THAT. WHAT THEY CAN'T DO IS GO AHEAD AND BREACH STATE LAW CONTRACT RIGHTS BY CHARGING MORE THAN THEY ARE

SUPPOSED TO OR CHARGING AMOUNTS DIFFERENT THAN WHAT THEY AGREED TO.

IT DOESN'T AFFECT THE ADMINISTRATION OF THE PLAN AT ALL. THIS IS A DISPUTE BETWEEN A LAW FIRM AND THE PARTICIPANTS OF THE PLAN TO RECOVER SOME MONEY. IT'S GOT NOTHING TO DO WITH THE ADMINISTRATION OF THAT PLAN. THAT PLAN IS CONTINUING TO FUNCTION. THE TRUSTEES ARE THE ONES ADMINISTERING THE PLAN.

AND IT'S THE SAME SITUATION AS IN *ARIZONA CARPENTERS* OR EVEN IN THE *GEWEKE* CASE.

THE COURT: THE WHICH CASE, SIR?

MR. KORNHAUSER: I THINK IT'S *GEWEKE* OR *GEWEKE*. THE CASE, THE DECEMBER 10TH CASE THAT WE SUBMITTED —

THE COURT: YES.

MR. KORNHAUSER: — TO YOUR HONOR A COUPLE OF DAYS AGO.

THE COURT: *GEWEKE FORD VERSUS* —

MR. KORNHAUSER: RIGHT

THE COURT: — *ST. JOSEPH'S OMNI PREFERRED CARE*?

MR. KORNHAUSER: YES, YOUR HONOR. YOU KNOW, IN THAT CASE YOU HAD THE INSURANCE PROVIDER THAT WAS ACTUALLY CHARGED WITH ALSO PROVIDING SERVICES, I.E., PROVIDING [13] INSURANCE FOR THE PLAN THAT PAID BENEFITS.

AND THE EMPLOYER IN THAT CASE SAID:

> "HEY, YOU GUYS HAVE OVERCHARGED. YOU, THE INSURANCE COMPANY, HAVE OVERCHARGED ME. YOU HAVE BREACHED YOUR CONTRACTUAL RIGHTS."

IF YOU ACCEPT MR. ASHE'S THEORY, THAT WOULD HAVE MEANT THAT THERE WOULD HAVE BEEN A WEDGE DRIVEN BETWEEN THE INSURANCE CARRIER AND THE PLAN AND THEREFORE YOU COULDN'T HAVE — THE EMPLOYER COULDN'T SUE.

AND THE COURT SAID:

> "NO. THAT'S NOT THE TYPE OF RELATIONSHIP WE ARE TALKING ABOUT. WE'RE TALKING WHAT ERISA GOVERNS IS A RELATIONSHIP BETWEEN THE PLAN AND ITS TRUSTEES, THE PLAN AND FIDUCIARIES. IT DOESN'T GOVERN RELATIONSHIPS WITH THIRD-PARTY SERVICE PROVIDERS THAT AREN'T FIDUCIARIES TO THE PLAN."

AND, IN FACT, I THINK THE NINTH CIRCUIT IN THE *ARIZONA CARPENTERS* CITING — WELL, IT

Appendix C

MAKES CLEAR AT PAGE 719 THAT THE LAW IS CLEAR THAT ATTORNEYS ARE NOT FIDUCIARIES, AND THAT CLAIMS CAN BE BROUGHT UNDER STATE LAW AGAINST ATTORNEYS.

THE COURT: YES. I'M LOOKING AT PAGE 720 OF THAT OPINION. AND THE COURT OF APPEALS STATED —

MR. KORNHAUSER:

"ATTORNEYS, ACCOUNTANTS."

[14] THE COURT:

"ATTORNEYS, ACCOUNTANTS AND OTHER PROFESSIONALS" —

MR. KORNHAUSER: RIGHT.

THE COURT: —

"ARE NOT FIDUCIARIES WHEN THEY PERFORM THEIR USUAL PROFESSIONAL FUNCTIONS AND EXERCISE" —

MR. KORNHAUSER: EXACTLY.

THE COURT: —

"DISCRETION."

MR. KORNHAUSER: NOW, THAT'S —

THE COURT: NOW, THAT IS, I ASSUME, DICTUM IN THIS *ARIZONA STATE CARPENTERS* CASE.

MR. KORNHAUSER: WELL, IT'S TRUE. ATTORNEYS WERE NOT INVOLVED IN THAT CASE. THAT'S TRUE. BUT, I MEAN, IT CITES A CASE, *YESETA*, WHERE ATTORNEYS WERE INVOLVED. AND I THINK THE POINT IS TO BE A FIDUCIARY YOU HAVE TO EXERCISE DISCRETION.

GIVING ADVICE IS NOT EXERCISING DISCRETION. THE PARTIES THAT EXERCISE THE DISCRETION ARE THE TRUSTEES AND THE INVESTMENT ADVISOR THAT ACTUALLY MAKES THE DECISIONS ON HOW TO INVESTIGATE THE FUNDS ASSETS.

BUT THE ATTORNEYS, I MEAN, THEY COULD TALK ALL DAY AND ALL NIGHT TO THE TRUSTEES. THEY COULD GIVE ALL THE ADVICE THEY WANT. AND AT THE END OF THE DAY THE TRUSTEES ARE THE ONES THAT MAKE THE DECISIONS.

AND THAT'S WHY ERISA DOES NOT PROTECT THEM. AND [15] IT DOESN'T IMPINGE ON THE RELATIONSHIP. ERISA WAS DESIGNED TO MAKE SURE THAT THE TRUSTEES AND THE PEOPLE THAT ACTUALLY ADMINISTER THE PLAN COMPLY WITH THE REQUIREMENTS OF ERISA.

AND THAT'S WHY THIRD-PARTY SERVICE PROVIDERS ARE NOT COVERED BY ERISA. AND

THAT'S WHY I BELIEVE THE NINTH CIRCUIT HAS CONSISTENTLY COME DOWN IN THE *ARIZONA CARPENTERS* CASE AND THE *GEWEKE FORD* CASE, THAT THESE PEOPLE — THAT ERISA — YOU KNOW, JUST BECAUSE A PENSION PLAN'S INVOLVED DOESN'T MEAN THAT ERISA IS IMPLICATED OR AFFECTED.

AND THE IDEA OF THE PREEMPTION IS TO GOVERN THOSE RELATIONSHIPS, WHEN THOSE RELATIONSHIPS AREN'T INVOLVED, LIKE HERE. WHAT YOU HAVE GOT HERE IS JUST AN ATTORNEY/CLIENT DISPUTE. AND WE THINK REMOVAL WAS IMPROPER AND OUGHT TO BE REMANDED.

THE COURT: ALL RIGHT.

LET ME GO BACK TO MR. ASHE FOR A MOMENT. AND, MR. ASHE, IF I CONCLUDED THAT THE CASE WAS NOT PROPERLY REMOVED UNDER *MOORE VERSUS KAISER PERMANENTE*, IN MY NORMAL COURSE WOULD AWARD FEES. SHOULD THAT INCLUDE FEES FOR THE MOTION FOR JUDGMENT ON THE PLEADINGS, AS WELL?

MR. ASHE: YOUR HONOR, IF YOU'RE GOING TO REMAND AND AWARD FEES I WOULD WANT IT TO BE AS SMALL AS POSSIBLE.

THE COURT: WELL, LET ME ASK YOU. THE PURPOSE OF THE FEE AWARD UNDER 1447(C) IS TO AWARD JUST COSTS AND [16] ACTUAL EXPENSES

INCLUDING ATTORNEY FEES INCURRED AS A RESULT OF AN IMPROPER REMOVAL. AND THE NOTION THAT CONGRESS HAD IN MIND WHEN IT AMENDED THAT PROVISION WAS THAT THERE ARE COSTS IMPOSED UPON THE PLAINTIFF IN A CASE THAT IS IMPROPERLY REMOVED THAT OUGHT TO BE COMPENSATED, BECAUSE THE WHOLE REMOVAL PROCESS HAS RESULTED IN A WASTE OF EFFORT AND A DELAY IN THE PROCEEDINGS. AND AT LEAST THE OUT-OF-POCKET EXPENSES ASSOCIATED WITH THAT OUGHT TO BE REIMBURSED.

NOW, IN THIS CASE WE HAVE IN ADDITION TO THE MOTION TO REMAND WHICH PLAINTIFF'S COUNSEL HAS BROUGHT, WE HAVE A MOTION FOR JUDGMENT ON THE PLEADINGS THAT HE'S HAD TO RESPOND TO.

THAT, I GATHER, WILL HAVE NO CARRYOVER VALUE WHEN THE CASE RETURNS TO STATE COURT. SO WHY SHOULD NOT THE FEE AWARD INCLUDE ALL OF THE FEES INCURRED IN THE CASE SINCE THE CASE WAS REMOVED?

MR. ASHE: YOUR HONOR, THERE WILL BE A VERY STRONG CARRYOVER WITH THE JUDGMENT ON THE PLEADINGS. I WOULD EXPECT THAT WE WOULD BRING A JUDGMENT ON THE PLEADINGS IN STATE COURT LARGELY ON- THE SAME GROUNDS. THERE'S A WHOLE ARGUMENT IN THE MOTION FOR JUDGMENT ON THE PLEADINGS

BASED ON THE STATE LAW RELATIONSHIP AND ON THE, QUOTE:

"FIDUCIARY AND CONTRACTUAL RELATIONSHIP."

[17] IF THIS CASE IS NOT AN ERISA CASE AND IT IS GOVERNED BY STATE LAW WE'RE GOING TO BRING THAT SAME MOTION.

MR. KORNHAUSER'S ALREADY SPENT THE TIME AND EFFORT PREPARING HIS OPPOSITION TO THAT MOTION AND TO HAVE US REIMBURSE HIM FOR THAT TIME AND EFFORT WHEN HE'S GOING TO USE IT AGAIN IN STATE LAW WOULD BE A WINDFALL TO HIM AND CERTAINLY NOT FAIR TO US. IT DOESN'T HAVE ANYTHING TO DO WITH THE REMAND.

THE COURT: ALL RIGHT, MR. KORNHAUSER, WHAT'S YOUR VIEW OF THIS?

MR. KORNHAUSER: WELL, YOUR HONOR, I THINK WE OUGHT TO BE AWARDED ATTORNEY'S FEES AND EXPENSES FOR BOTH. I MEAN, I THINK IT WAS FAIRLY CLEAR THAT REMOVAL WAS IMPROPER. THEY COULD HAVE HELD OFF ON THEIR MOTION FOR JUDGMENT ON THE PLEADINGS OR TO STAY THIS ACTION.

WE COULD HAVE AVOIDED A LOT OF TIME AND EXPENSE IN CONNECTION WITH THIS. IT'S NOT

CLEAR WHETHER THEY ARE GOING TO BRING THEIR MOTION OR NOT. AND, FRANKLY, I THINK THEIR MOTION FOR JUDGMENT ON THE PLEADINGS IS FRIVOLOUS, ALSO. BUT I GUESS THAT'S GOING TO BE FOR THE STATE COURT TO DECIDE.

BUT THE UPSHOT OF THE DEAL IS IS WE'RE GOING TO HAVE TO REVISIT THAT ISSUE AGAIN. IT SHOULDN'T HAVE BEEN BROUGHT HERE IN THE FIRST PLACE. AND WE THINK WE OUGHT TO [18] BE AWARDED ATTORNEY'S FEES AND COSTS FOR BOTH MOTIONS.

THE COURT: MATTER SUBMITTED?

MR. KORNHAUSER: YES, YOUR HONOR.

THE COURT: SUBMITTED?

MR. ASHE: YES, YOUR HONOR. THANK YOU.

THE COURT: VERY WELL. THE COURT IN THIS IS GUIDED BY 29 CFR, SECTION 2609, 75-5 WHICH STATES THAT:

> "ATTORNEYS PERFORMING THEIR USUAL PROFESSIONAL FUNCTIONS WILL NOT ORDINARILY BE CONSIDERED FIDUCIARIES."

THIS PRINCIPLE HAS BEEN HELD BY THE NINTH CIRCUIT IN ITS DECISION IN *YESETA VERSUS BAIMA* WHICH NOTED THAT:

Appendix C

"AN ATTORNEY MAY BE CONSIDERED AN ERISA FIDUCIARY ONLY IF HIS WORK INVOLVES: ONE, EXERCISING DISCRETIONARY AUTHORITY OR DISCRETIONARY CONTROL, RESPECTING THE MANAGEMENT OF AN ERISA PLAN; TWO, EXERCISING AUTHORITY OR CONTROL RESPECTING PLAN MANAGEMENT OR DISPOSITION OF AN ERISA PLAN, PLAN'S ASSETS; THREE, RENDERING INVESTMENT ADVICE FOR A FEE, DIRECT OR INDIRECT WITH RESPECT TO THE ASSETS OF AN ERISA PLAN OR THE EXERCISE OF AUTHORITY OR RESPONSIBILITY TO DO THESE THINGS; OR, FOUR, HAVING DISCRETIONARY AUTHORITY OR DISCRETIONARY RESPONSIBILITY WITH RESPECT TO THE ADMINISTRATION OF AN ERISA PLAN."

[19] FROM THE DESCRIPTION IN THE RECORD BEFORE THE COURT AUGMENTED BY THAT PROVIDED THIS MORNING BY MR. ASHE, IT SEEMS PLAIN THAT THE SERVICES TO BE PERFORMED BY THE SEYFARTH FIRM UNDER THE CONTRACT AT BAR WITH THE PLAINTIFF WERE TRADITIONAL ATTORNEY SERVICES, AND THUS THESE PROFESSIONAL FUNCTIONS WILL NOT SUPPORT A DETERMINATION THAT ERISA APPLIES TO THEIR PERFORMANCE.

AND, ACCORDINGLY, THE BASIS FOR REMOVAL UNDER ERISA IS ABSENT AND THE COURT SHOULD,

THEREFORE, REMAND THE CASE TO THE STATE COURT FROM WHENCE IT CAME, SAN FRANCISCO SUPERIOR COURT.

IN THAT CONNECTION, SECTION 1447(C) AUTHORIZES THE COURT TO AWARD JUST COSTS AND ACTUAL EXPENSES, INCLUDING ATTORNEY'S FEES, INCURRED AS THE RESULT OF AN IMPROPER REMOVAL.

SECTION 1447(C) IS NOT PUNITIVE. IT SIMPLY REIMBURSES PLAINTIFFS FOR UNNECESSARY LITIGATION COSTS ATTRIBUTABLE TO ANY IMPROPER REMOVAL. AND THAT DETERMINATION, THAT INTERPRETATION OF SECTION 1447, OF COURSE, IS SET OUT BY THE NINTH CIRCUIT IN ITS DECISION IN *MOORE VERSUS PERMANENTE MEDICAL GROUP* AT 981 F. 2D.

GIVEN THAT THIS ACTION WAS IMPROVIDENTLY REMOVED, THERE SEEMS LITTLE QUESTION THAT UNDER 1447(C) THE COURT SHOULD AWARD THE JUST COSTS AND EXPENSES INCURRED BY THE PLAINTIFFS. AND THAT IN THE COURT'S VIEW SHOULD EMBRACE [20] ALL ACTIVITIES SINCE THE CASE WAS REMOVED, INCLUDING THE BRIEFING AND RESEARCH ASSOCIATED WITH THE MOTION ON JUDGMENT ON THE PLEADINGS.

TO BE SURE THERE MAY BE SOME VALUE TO THIS LEGAL RESEARCH AND BRIEFING WHEN THE

CASE RETURNS TO STATE COURT, BUT THE LITIGATION OF THAT ISSUE HERE IN FEDERAL COURT WAS WHOLLY UNNECESSARY, AND ATTRIBUTABLE SOLELY TO THE REMOVAL, AND, THEREFORE, SHOULD BE EMBARRASSED IN THE COURT'S VIEW IN THE AWARD OF JUST COSTS AND EXPENSES UNDER 1447(C).

NOW, THE COURT NOTES THAT THE PLAINTIFF HAS NOT SUBMITTED THE REQUISITE INFORMATION FROM WHICH THE COURT CAN DETERMINE A PRECISE DOLLAR AWARD, CONSEQUENTLY THE DIRECTIVE TO THE PLAINTIFF WILL BE TO SUBMIT TO THE COURT IN WRITING ON OR BEFORE JANUARY 9, 1998, THE COSTS AND FEES INCURRED AS A RESULT OF THE IMPROPER REMOVAL.

THAT INCLUDES INFORMATION CONCERNING THE ATTORNEYS WHO WORKED ON THE CASE, THE NUMBER OF YEARS THAT THEY HAVE PRACTICED LAW, THE WORK THAT THESE ATTORNEYS DID ON THE CASE, THE FEES THAT WERE GENERATED AS A RESULT, AND A SUBMISSION ABOUT HOW THE HOURLY FEES CLAIMED COMPARE WITH HOURLY FEES CHARGED BY OTHER ATTORNEYS IN THE AREA OF SIMILAR BACKGROUND AND EXPERIENCE.

AND THE DEFENDANT MAY SERVE A RESPONSE TO THE PLAINTIFF'S SUBMISSION CONCERNING FEES BY JANUARY 16, WHEREUPON THE MATTER WILL BE SUBMITTED ON THE PAPERS.

Appendix C

[21] ALL RIGHT? ANYTHING FURTHER?

MR. KORNHAUSER: THANK YOU, YOUR HONOR.

MR. ASHE: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU.

(WHEREUPON, THIS HEARING WAS CONCLUDED.)

* * * *

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED AND FILED DECEMBER 31, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-97-03633-VRW

ANTHONY RUTLEDGE, an individual on his own behalf and beneficiaries of the Hotel Union and Hotel Industry of Hawaii Pension Trust; and AFL HOTEL & RESTAURANT WORKERS' HEALTH AND WELFARE TRUST FUND,

Plaintiffs,

v.

SEYFARTH, SHAW, FAIRWEATHER, AND GERALDSON, a law partnership; MICHAEL WHITEHEAD, an individual; and DOES 1-50,

Defendants.

ORDER

For the reasons stated on the record at the hearing held on December 19, 1997, the court GRANTS plaintiff's motion to remand to San Francisco superior court (Doc # 6, pt 1) and DISMISSES defendants' motion for judgment on the pleadings or in the alternative, for an order staying the action pending completion of a related sister action in the District of Hawaii (Doc # 10, pts 1 & 2) as moot.

Appendix D

In accordance with the court's intent to award fees and costs of the improvident remand, the plaintiff shall inform the court of the fees and costs so incurred (inclusive of the judgment on the pleadings) no later then January 9, 1998. Defendants may respond to that submission by January 16, 1998, whereupon the court will deem the matter submitted on the papers.

The clerk shall transfer the file to the clerk of the San Francisco superior court. The court retains jurisdiction to award the fees and costs associated with the improvident removal.

IT IS SO ORDERED.

s/ Vaughn R. Walker
VAUGHN R. WALKER
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED AND FILED JANUARY 26, 1998

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-97-03633-VRW

ANTHONY RUTLEDGE, an individual on his own behalf and beneficiaries of the Hotel Union and Hotel Industry of Hawaii Pension Trust; and AFL Hotel & Restaurant Workers' Health and Welfare Trust Fund,

Plaintiffs,

v.

SEYFARTH, SHAW, FAIRWEATHER, AND GERALDSON, a law partnership; MICHAEL WHITEHEAD, and individual; and DOES 1-50,

Defendants.

ORDER

On January 5, 1998, the court requested that plaintiff inform it of all attorney fees and costs incurred in relation to plaintiffs' motion to remand to San Francisco superior court and defendants' motion for judgment on the pleadings or in the alternative, for an order staying the action pending completion of a related sister action in the District of Hawaii. The court, having granted plaintiffs' motion for attorney fees

and costs pursuant to 28 USC § 1447(c), will now evaluate plaintiffs' request. For the following reasons, the court will award plaintiffs reasonable attorney fees and costs in the amount of $23,052.22.

I

An award of attorney fees and costs to the opposing party must be reasonable. In determining a reasonable award, "the [c]ourt ordinarily must multiply the number of hours reasonably spent on the case by a reasonable hourly rate, to reach the so-called 'lodestar' amount." *Trustees of the Central States SE & SW Areas Pension Fund v Golden Nugget, Inc*, 697 F Supp 1358, 1555 (CD Cal 1988), citing *Pennsylvania v Delaware Valley Citizens' Council for Clean Air*, 478 US 546, 564-66 (1986); *Miller v Los Angeles County Bd of Educ*, 827 F2d 617, 621 (9th Cir 1987). A strong presumption exists that the lodestar in a reasonable fee. See *Miller*, 827 F2d at 621. The burden is on the party requesting fees to prove "that the requested rates are in line with those prevailing in the community for similar services of lawyers of comparable skill or reputation." *Jordan v. Multnomah County*, 815 F2d 1258, 1263 (9th Cir 1987), citing *Blum v. Stenson*, 465 US 886, 895-97 & n. 11 (1984).

In the instant case, plaintiffs' attorney has been practicing law in California for over twenty years. He has specifically litigated ERISA issues for a majority of that time and has worked on ERISA matters for more that 100 retirement plans. Plaintiffs' attorney also has an LLM in Taxation from NYU where he studied ERISA and pension law in depth. Given plaintiffs' attorney's experience and skill

in litigating and working on ERISA matters, the hourly billing rate of $265.00 is reasonable here.

The hours spent by plaintiffs' attorney were incurred as a direct result of the violation. The court, at the hearing held on December 19, 1997, and in its order dated January 5, 1998, specifically stated that the fees and costs incurred by plaintiff should include the judgment on the pleadings in addition to the remand motion. Defendants' argument that plaintiffs are not entitled to recover attorney fees and costs unrelated to the motion to remand, therefore, is contrary to the court's order.

Plaintiffs' attorney, while experienced in ERISA issues, had to research ERISA preemption and Hawaii state law issues that added to the complexity of and time spent on the remand motion. He also had to respond to defendants' judgment on the pleadings, review defendants' opposition motions, prepare for and attend oral arguments on the remand motion, and prepare plaintiffs' request for attorney fees and costs. Defendants' argument that plaintiffs' requested fee award is "incredible" is based on the premise that plaintiffs are solely requesting attorney fees and costs for the remand motion itself. Defendants are well aware, however, that the court is awarding attorney fees and costs for all work causally connected to the remand motion. The 86.50 hours requested by plaintiffs are, therefore, reasonable in light of the type and amount of work performed by their attorney.

Appendix E

II

For the foregoing reasons, the court AWARDS plaintiffs $23,052.22 in attorney fees and costs.

IT IS SO ORDERED.

s/ Vaughn R. Walker
VAUGHN R. WALKER
United States District Judge

APPENDIX F — RELEVANT STATUTES

28 U.S.C. §§ 1447(c) and (d)

§ 1447 Procedure after removal generally

* * *

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorneys fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

* * *

Appendix F

29 U.S.C. § 1106(a)

Sec. 1106. Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

* * *

29 U.S.C. § 1108(b)

Sec. 1108. Exemptions from prohibited transactions

* * *

(b) Enumeration of transactions exempted from section 1106 prohibitions

The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions:

(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis, (B) are not made available to highly compensated employees (within the meaning of section 414(q) of Title 26) in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of

interest, and (E) are adequately secured. A loan made by a plan shall not fail to meet the requirements of the preceding sentence by reason of a loan repayment suspension described under section 414(u)(4) of Title 26.

(2) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.

(3) A loan to an employee stock ownership plan (as defined in section 1107(d)(6) of this title), if —

> (A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and
>
> (B) such loan is at an interest rate which is not in excess of a reasonable rate.
>
> If the plan gives collateral to a party in interest for such loan, such collateral may consist only of qualifying employer securities (as defined in section 1107(d)(5) of this title).

(4) The investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such

bank or other institution is a fiduciary of such plan and if —

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurers is —

(A) the employer maintaining the plan, or

(B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by any person which is a party in interest with respect to the plan, but only if the total premiums and annuity

consideration written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).

(6) The providing of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan, and if —

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or

similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and adherence to such guidelines would reasonably preclude such bank or similar financial institution from providing such ancillary service (i) in an excessive or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans.

Such ancillary services shall not be provided at more than reasonable compensation.

(7) The exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion.

(8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency or (ii) a pooled investment fund of an insurance company qualified to do business in a State, if —

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan.

(9) The making by a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 1344 of this title (relating to allocation of assets).

(10) Any transaction required or permitted under part 1 of subtitle E of subchapter III of this chapter.

(11) A merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 1411 of this title.

(12) The sale by a plan to a party in interest on or after December 18, 1987, of any stock, if —

(A) the requirements of paragraphs (1) and (2) of subsection (e) of this section are met with respect to such stock,

(B) on the later of the date on which the stock was acquired by the plan, or January 1, 1975, such stock constituted a qualifying employer security (as defined in section 1107(d)(5) of this title as then in effect), and

(C) such stock does not constitute a qualifying employer security (as defined in section 1107(d)(5) of this title as in effect at the time of the sale).

(13) Any transfer in a taxable year beginning before January 1, 2001, of excess pension assets from a defined benefit plan to a retiree health account in a qualified transfer permitted under section 420 of title 26 (as in effect on January 1, 1995).

* * * *

APPENDIX G — CLASS ACTION COMPLAINT DATED AUGUST 15, 1997 AND FILED AUGUST 27, 1997

SAMUEL KORNHAUSER, Bar No. 83528
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Attorney for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN FRANCISCO

Case No. 989163

ANTHONY RUTLEDGE, an individual on his own behalf and on behalf of all other plan participants and beneficiaries of the Hotel Union and Hotel Industry of Hawaii Pension Trust; and AFL Hotel & Restaurant Workers' Health & Welfare Trust Fund,

Plaintiffs,

v.

SEYFARTH, SHAW, FAIRWEATHER and GERALDSON, a California law partnership; MITCHEL WHITEHEAD, an individual; DOES 1-50,

Defendants.

Appendix G

CLASS ACTION COMPLAINT FOR DAMAGES, BREACH OF CONTRACT, BREACH OF FIDUCIARY DUTY, BAD FAITH, FRAUD AND NEGLIGENT MISREPRESENTATION

Plaintiffs allege as follows:

1. Plaintiff Anthony Rutledge as a participant in the Hotel Union and Hotel Industry of Hawaii Pension Trust, a retirement plan administered in the State of Hawaii, and as a participant in the AFL Hotel & Restaurant Workers' Health & Welfare Trust Fund, (collectively the "Trusts") brings this action on his own behalf and on behalf of all other present and post participants and beneficiaries of the Trusts from March 1984 to the present.

2. Defendant Seyfarth, Shaw, Fairweather and Geraldson ("Seyfarth") is a California law firm engaged in the practice of law with offices in San Francisco.

3. Mitchel Whitehead is an attorney licensed to practice law in the State of California.

4. DOES 1-50 are unknown at the present time but are believed to have participated in the wrongful acts alleged herein. This complaint will be amended to name said individuals when their true names are ascertained.

5. Each of said defendants was at all times pertinent the agent and employee of each other defendant and committed the acts alleged herein or assisted each other defendant in such wrongful conduct.

Appendix G

CLASS ACTION ALLEGATIONS

6. Plaintiff brings this action as a class action pursuant to California Code of Civil Procedure, Section 382 on his own behalf and on behalf of a class consisting of all participants and beneficiaries of the Trusts during the period from March 9, 1984 through the present inclusive, (the "Class Period"), and who suffered damages as a result of Defendants charging excessive attorneys fees.

7. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to the plaintiffs at this time, they can be ascertained through appropriate review of trust documents. Plaintiffs believe there are, at a minimum, thousands of members of the Class during the Class Period.

8. Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact common to the Class are:

(a) whether state laws were violated by defendants' acts as alleged herein;

(b) whether defendants charged excessive attorneys fees during the Class Period;

(c) whether defendants breached their fiduciary duties in charging excessive attorneys fees; and

(d) whether the members of the Class have sustained damages and, if so, what is the proper measure of damages.

9. Plaintiff's claims are typical of the claims of the members of the Class as plaintiff and members of the Class sustained damages arising out of defendants' wrongful conduct as complained of herein.

10. Plaintiff will fairly and adequately protect the interests of the members of the Class and has retained counsel competent and experienced in class action litigation. Plaintiff has no interests antagonistic to or in conflict with those of the Class.

11. A class action is superior to other available methods for the fair and efficient adjudication of the controversy since joinder of all members of the Class is impracticable. Furthermore, because the damages suffered by the individual Class members may be relatively small, the expense and burden of individual litigation may make it impossible for the Class members individually to redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

FIRST CAUSE OF ACTION
(Breach of Contract)

12. On or about March 9, 1984, the Trusts on behalf of plaintiffs entered into an agreement with Seyfarth whereby Seyfarth agreed to perform legal services to the Trust on behalf of plaintiffs and to be compensated for said legal

services at the rate of $155 per hour. A copy of the agreement is attached hereto as Exhibit A.

13. During 1986 and thereafter, defendant Whitehead, an attorney employed by Seyfarth, began providing the legal services which Seyfarth had contracted to perform for plaintiffs. Whitehead as an employee of Seyfarth continued to perform legal services pursuant to the contract from 1986 to the present.

14. Defendants Seyfarth and Whitehead breached their contract with plaintiffs by charging the Trusts on behalf of plaintiffs, legal fees at an hourly rate in excess of $155 per hour.

15. Said defendants' breach was a material breach of the contract which called for defendants to charge and be paid $155 per hour for their legal work.

16. The Trusts on behalf of plaintiffs, paid defendants' bills without plaintiffs knowing that they were being charged more than $155 per hour. The plaintiffs did not know they were being charged in excess of $155 per hour because defendants submitted block invoices with no breakdown as to the amount of hours spent, who performed the work, the amount of time spent on each item of legal services or the hourly rate being charged. Defendants' failure to make these disclosures in the invoices they sent to plaintiffs was a violation of California Business & Professions Code §6148.

17. As a direct and proximate result of defendants' breach of their agreement, plaintiffs have been overcharged

and have paid more than they were required to pay for legal services under the agreement and have been damaged in an amount to be determined according to proof.

SECOND CAUSE OF ACTION
(Breach of Covenant of Good Faith)

18. Plaintiffs reallege Paragraphs 1-17 of this Complaint as though fully set forth herein.

19. Defendants know that they were charging and being paid hourly legal fees by plaintiffs which were in excess of the $155 per hour fees agreed to in the contract. Defendants charged these excessive fees knowing that they were excessive and hid the fact that their fees were excessive by block billing so that plaintiffs would not know or suspect that their fees were excessive.

20. Imposed as a term of the contract was an implied covenant of good faith and fair dealing whereby defendants agreed not to take any action which would interfere with the full and fair performance of the contract.

21. Defendants knowingly, willfully and fraudulently breached their covenant of good faith and fair dealing by block billing and hiding their true hourly rate, to hide from plaintiffs the fact that defendants were charging in excess of the $155 per hour which they had agreed to charge.

22. Plaintiffs have been damaged in an amount according to proof as a direct and proximate result of defendants' bad faith actions in charging excessive hourly fees.

23. Defendants' acts were wanton, willful, fraudulent and despicable, entitling plaintiffs to punitive damages.

THIRD CAUSE OF ACTION
(Breach of Fiduciary Duty)

24. Plaintiffs reallege Paragraphs 1-23 of this Complaint as though fully set forth herein.

25. Defendants, as attorneys for plaintiffs, were fiduciaries in performing legal services for plaintiffs and defendants owed to plaintiffs a fiduciary duty not to take any actions adverse to their clients' interests, including not to deceive, defraud or excessively overcharge plaintiffs.

26. Defendants breached their fiduciary duty to plaintiffs by block billing and charging plaintiffs hourly rates in excess of $155 per hour.

27. As a direct and proximate result of defendants' actions, plaintiffs were damaged by being charged and paying legal fees in excess of $155 per hour in an amount according to proof.

28. Defendants' actions were wanton, willful, fraudulent and despicable, entitling plaintiffs to punitive damages.

FOURTH CAUSE OF ACTION
(Fraud)

29. Plaintiffs reallege Paragraphs 1-28 of this Complaint as though fully set forth herein.

Appendix G

30. Defendants and each of them continuously represented to plaintiffs that defendants were charging $155 per hour for their legal fees.

31. Those representations were false. Defendants were charging in excess of $155 per hour. Defendants knew their representations and omissions were false.

32. Plaintiffs did not know that defendants' representations and omissions were false. Plaintiffs reasonably relied on defendants' representations that their fees were $155 per hour and defendants' omissions in failing to inform plaintiffs that defendants were charging in excess of $155 per hour. Plaintiffs reasonably relied on the fact that defendants were their attorneys and assumed defendants would not lie to them and had no reason to believe that defendants would defraud plaintiffs.

33. As a direct and proximate result of defendants' fraud, plaintiffs were induced to and did pay to defendants legal fees in excess of $155 per hour.

34. Had plaintiffs known the true facts they would not have paid defendants excessive hourly fees.

35. As a direct and proximate result of defendants' fraud, plaintiffs paid legal fees in excess of the amount they should have paid in an amount according to proof.

36. Defendants' acts were wanton, willful, fraudulent and despicable, entitling plaintiffs to punitive damages.

Appendix G

FIFTH CAUSE OF ACTION
(Constructive Fraud)

37. Plaintiffs reallege Paragraphs 1-36 of this Complaint as though fully set forth herein.

38. Defendants' concealment and failure to notify plaintiffs that defendants were charging plaintiffs hourly legal fees in excess of $155 per hour were fraudulent.

39. As a direct and proximate result of defendants' constructive fraud, plaintiffs have been damaged by paying excessive legal fees in an amount to be determined in accordance with proof.

40. Defendants' acts and omissions were wanton, willful, fraudulent and despicable, entitling plaintiffs to punitive damages.

SIXTH CAUSE OF ACTION
(Negligent Misrepresentation)

41. Plaintiffs reallege Paragraphs 1-40 of this Complaint as though fully set forth herein.

42. Defendants negligently charged plaintiffs hourly legal fees in excess of the $155 per hour which they should have charged.

43. As a direct and proximate result of defendants' negligent misrepresentations, plaintiffs were damaged in an amount according to proof.

WHEREFORE, plaintiffs pray as follows:

1. That this action be certified as a class action.

2. As to each cause of action for damages according to proof.

3. As to the Second, Third, Fourth and Fifth Causes of Action for punitive damages.

4. For costs of suit herein.

5. For reasonable attorneys' fees.

6. For such other relief as the Court deems appropriate.

DATED: August 15, 1997 LAW OFFICES OF
SAMUEL KORNHAUSER

By: s/ Samuel Kornhauser
Samuel Kornhauser
Attorney for Plaintiffs

JURY DEMAND

Plaintiff hereby demands a trial by jury as to all Causes of Action.

DATED: August 15, 1997 LAW OFFICES OF
SAMUEL KORNHAUSER

By: s/ Samuel Kornhauser
Samuel Kornhauser
Attorney for Plaintiffs

Supreme Court, U.S.
FILED
OCT 10 2000
CLERK

(2)

No. 00-0356

In The

Supreme Court of the United States

ANTHONY RUTLEDGE, an individual on his own behalf and beneficiaries of the Hotel Union and Hotel Industry of Hawaii Pension Trust; AFL HOTEL & RESTAURANT WORKERS' HEALTH AND WELFARE FUND,
Petitioners,

v.

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, a California law partnership; MITCHELL WHITEHEAD,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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* Counsel of Record

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CINCINNATI, OHIO 800-890-5001

22 pp

QUESTIONS PRESENTED

1. Whether this Court should review the circuits' unanimous view that a collateral award of attorneys' fees and costs upon remand may be reversed where the underlying remand order was based on legal error?

2. Whether this Court should accept Petitioner's invitation to revisit last term's decision in *Harris Trust v. Saloman Smith Barney* in order to review for error its holding that ERISA provides a cause of action against nonfiduciary service providers for their participation in violations of the prohibited transaction rules?

PARTIES TO PROCEEDINGS

Petitioner

Petitioner is Mr. Anthony Rutledge, a former Trustee of, and participant in the Hotel Union and Hotel Industry of Hawaii Pension Trust and AFL Hotel & Restaurant Workers Health & Welfare Trust Fund, on his own behalf and purportedly on behalf of an uncertified class consisting of participants in said plans. Petitioner was Plaintiff before the Northern District of California and Respondent before the United States Court of Appeals for the Ninth Circuit.

Respondents

Respondents are the law partnership of Seyfarth Shaw (sued under its former name, Seyfarth, Shaw, Fairweather & Geraldson) and Mr. Mitchel Whitehead, a partner in Seyfarth Shaw. Respondents were Defendants before the Northern District of California and Appellants before the United States Court of Appeals for the Ninth Circuit.

None of these parties is a corporation, and no publicly-held corporation owns any portion of these parties.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUES OR OTHER PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

I. THE CIRCUITS AGREE THAT THEY NEED NOT AFFIRM AN AWARD OF ATTORNEYS' FEES UNDER 28 U.S.C. § 1447(c) WHEN THE UNDERLYING REMAND WAS LEGAL ERROR 2

II THIS COURT NEED NOT REVISIT LAST TERM'S DECISION IN *HARRIS TRUST* FOR THE PURPOSE OF DETERMINING WHETHER THE UNANIMOUS CIRCUITS ARE IN ERROR 7

CONCLUSION 14

TABLE OF AUTHORITIES

Cases:

Airparts Co. v. Custom Benefit Services,
28 F.3d 1062 (10th Cir. 1994) 11

Agostini v. Felton,
521 U.S. 203, 117 S.Ct. 1997 (1997) 2

Arizona State Carpenters Pension Trust v. Citibank,
125 F.3d 715 (9th Cir. 1997) 12

Avitts v. Amoco Production Co.,
111 F.3d 30 (5th Cir. 1997) 3

Baddie v. Berkeley Farms, Inc.,
64 F.3d 487 (9th Cir. 1995) 4

Cooter & Gell v. Hartman Corp.
496 U.S. 384, 110 S.Ct. 2447 (1990) 5-6

Custer v. Sweeny,
89 F.3d 1156 (4th Cir. 1996) 11

Daleske v. Fairfield Communities, Inc.,
17 F.3d 321 (10th Cir), *cert. denied,*
511 U.S. 1082 (1994) 4

Excell, Inc. v. Sterling Boiler & Mechanical, Inc.,
106 F.3d 318 (10th Cir. 1997) 4

Harris Trust & Savings Bank v. Salomon
Smith Barney, Inc., - U.S. -,
120 S.Ct. 2180 (2000) . . . . . *passim*

Koon v. United States,
518 U.S. 81, 116 S.Ct. 2035 (1996) 3

Lockheed Corp. v. Spink,
517 U.S. 882, 116 S.Ct. 1783 (1996) 8, 9

Mints v. Educational Testing Service,
99 F.3d 1253 (3d Cir. 1996) 3, 6

Miranti v. Lee,
3 F.3d 925 (5th Cir. 1993) 3, 4, 5

Moore v. Permanente Medical Group, Inc.,
981 F.2d 443 (9th Cir. 1992) 4

Painters District Council No. 21 v. Price Waterhouse,
879 F.2d 1146 (3d Cir. 1989) 12

Pappas v. Buck Consultants, Inc.,
923 F.2d 531 (7th Cir. 1991) 11

Robi v. Five Platters, Inc.,
838 F.2d 318 (9th Cir. 1988) 7

Sanford v. Moving Picture Machine Operators' Protective Union, 14 F.3d 596,
1993 WL 542168 (4th Cir. 1993) 3

Schmitt v. Insurance Co. of North America,
845 F.2d 1546 (9th Cir. 1988) 4

Stallworth v. Greater Cleveland Regional Transit Authority, 105 F.3d 252
(6th Cir. 1997) 5, 6

Suder v. Blue Circle, Inc.,
116 F.3d 1351 (10th Cir. 1997) 4

Tenner v. Zurek,
168 F.3d 328 (7th Cir. 1999) 2

Valdes v. Wal-Mart Stores, Inc.,
199 F.3d 290 (5th Cir. 2000) 3

Statutes and Rules:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1447 . . . . . 1, 2

28 U.S.C. § 2283 7

29 U.S.C. § 1002(14)(B) 11

29 U.S.C. § 1104(a)(1)(B), ERISA § 404 10

29 U.S.C. § 1106, ERISA § 406 . . . . . 1, 11

29 U.S.C. § 1108, ERISA § 408 . . . . . 1, 11

29 U.S.C. § 1132 12

Supreme Court Rule 15.1 1

Fed.R.Civ.P., Rule 12 9

Other Authorities:

Judicial Improvements and Access to Justice Act, Pub. L. 100, 102 Stat. 4642 3

RESTATEMENT (SECOND) OF JUDGMENTS § 15 (1982) 7

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d 1212 (9th Cir.), *modified, rehearing denied and request for rehearing* en banc *rejected*, 208 F.3d 1170 (2000), and attached as Appendices A and B to the Petition.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

This Petition raises questions under 28 U.S.C. § 1447, 29 U.S.C. § 1106 and 29 U.S.C. § 1108, attached to the Petition as, respectively, Appendices E, F and G.

STATEMENT OF THE CASE

Respondents adopt the statement of facts contained in the opinion below. (App. A, pp. 2a-5a.) In addition, pursuant to Rule 15.1, Respondents point out that the Petition incorrectly represents that the Court of Appeals "was issuing a de facto 'reversal' of the remand order" and that it sought "to *reverse* a non-appealable remand order." (Petition, p. 3 [emphasis in original].) The Court of Appeals did not reverse the District Court's remand order. It simply determined that because the original removal was proper, a collateral award of costs and fees under 28 U.S.C. § 1447(c) was necessarily an abuse of discretion. The remainder of Petitioner's

Statement of the Case (Petition, pp. 3-5) contains erroneous legal argument that is addressed below.

REASONS FOR DENYING THE WRIT

I. THE CIRCUITS AGREE THAT THEY NEED NOT AFFIRM AN AWARD OF ATTORNEYS' FEES UNDER 28 U.S.C. § 1447(c) WHEN THE UNDERLYING REMAND WAS LEGAL ERROR.

Six of the Circuits agree, and none disagree,[1] that they may reverse a collateral award of fees and costs awarded under Section 1447(c) if the underlying remand was erroneous. The rationale for reversal is simple and unassailable: an exercise of discretion resting on a foundation of legal error is inherently an abuse of discretion.[2] This Court

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[1] A Seventh Circuit decision contains one ambiguous footnote that might erroneously be construed as a rejection of the power to reach the an underlying remand when reviewing an award of costs and fees. *Tenner v. Zurek*, 168 F.3d 328, 329 n.1 (7th Cir. 1999). The footnote actually rejects an argument that the fee award was improper because the underlying remand was a refusal to exercise federal jurisdiction rather than a finding that federal jurisdiction was lacking. (The court cited a Fourth Circuit decision rejecting precisely this latter argument.) In a different footnote the court quotes decisions of other circuits holding that review of the underlying remand is proper when reviewing an award of costs and fees, without noting any disagreement. *Id.* at 330 n.2.

[2] *See Agostini v. Felton*, 521 U.S. 203, 238, 117 S.Ct. 1997, 2018 (1997) ("[An] exercise of discretion cannot be permitted to stand if . . . based upon a legal principle that can no

should decline to review Petitioner's assignment of error to this rule, which is not the subject of any inter-circuit conflict.

Petitioner attempts to create the appearance of an inter-circuit conflict by citing to *dicta* in a 1989 Sixth Circuit ruling arising under a previous version of Section 1447.[3] However, he fails to inform this Court that the Third,[4] Fourth,[5] Fifth,[6]

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longer be sustained."); *Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035, 2047 (1996) ("[A] district court by definition abuses its discretion when it makes an error of law . . . .")

[3] Section 1447(c) was amended on November 19, 1988 by the Judicial Improvements and Access to Justice Act, Pub. L. 100-702, 102 Stat. 4642, 4670.

[4] *Mints v. Educational Testing Service*, 99 F.3d 1253, 1260-61 (3d Cir. 1996) ("[W]e agree that section 1447(d), in precluding an appeal from an order of remand for a reason provided for remand in section 1447(c), does not preclude all evaluation of a remand order. . . We also point out that a court of appeals might be reluctant to uphold an award of fees under section 1447(c) if it concluded that the district court erred in remanding the case for a reason enumerated in section 1447(c) even though it could not reverse the order of remand.")

[5] *Sanford v. Moving Picture Machine Operators' Protective Union*, 14 F.3d 596, 1993 WL 542168 (4th Cir. 1993) ("the propriety of the defendant's removal continues to be central in determining whether to impose fees.") (quoting *Miranti v. Lee*, 3 F.3d 925, 928 [5th Cir. 1993]).

[6] *Miranti v. Lee*, 3 F.3d 925, 928 (5th Cir. 1993) ("[W]e hold that the propriety of the defendant's removal continues to be central in determining whether to impose fees."). *Accord*, *Valdes v. Wal-Mart Stores, Inc.*, 199 F.3d 290, 292 (5th Cir. 2000); *Avitts v. Amoco Production Co.*, 111 F.3d 30, 32 (5th Cir. 1997).

and Tenth[7] Circuits all agree with the Ninth on this point, and that the Ninth's position is based on longstanding precedent, not simply a whim of the reviewing panel.[8]

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[7] *Daleske v. Fairfield Communities, Inc.*, 17 F.3d 321, 324 (10th Cir), *cert. denied*, 511 U.S. 1082 (1994) ("'the propriety of the defendant's removal continues to be central in determining whether to impose fees'") (quoting *Miranti*, 3 F.3d at 928). *Accord, Suder v. Blue Circle, Inc.*, 116 F.3d 1351, 1352 (10th Cir. 1997); *Excell, Inc. v. Sterling Boiler & Mechanical, Inc.*, 106 F.3d 318, 322 (10th Cir. 1997).

[8] *Baddie v. Berkeley Farms, Inc.*, 64 F.3d 487, 490 (9th Cir. 1995) ("Although awards of attorney's fees are generally reviewed only for abuse of discretion, this court reviews de novo the legal question of whether section 1447(c) authorizes the fee."); *Moore v. Permanente Medical Group, Inc.*, 981 F.2d 443, 447 (9th Cir. 1992) ("Given the wise discretion provided the district court by section 1447(c), we will review an award of attorney's fees under this statute for an abuse of discretion. Although this standard will require some consideration of the underlying remand order, [citation omitted] such consideration does not amount to impermissible review of the remand order. After all, on review of the fee award, we are not empowered to reverse the remand order, whether or not it is erroneous."); *Schmitt v. Insurance Co. of North America*, 845 F.2d 1546, 1551-52 (9th Cir. 1988) ("The fact that section 1447(d) bars review of the district court's order of remand does not effect our jurisdiction to review that portion of the district court's order awarding attorney's fees to the plaintiffs. . . . The district court's award of attorney fees in the present case completely and finally disposed of all claims before the court. We conclude, therefore, that we have jurisdiction to review that portion of the district court's order awarding attorney's fees to the plaintiffs.")

Petitioner also fails to inform this Court that the Sixth Circuit decision upon which he relies has no continuing vitality. First, the Fifth Circuit has expressly declined to adopt the Sixth Circuit's reasoning[9] (the others do so by necessary implication), and none has adopted it. Second, while the Sixth Circuit "seemingly eschewed consideration of the merits of the defendant's argument for removal, it nevertheless considered the 'weakness' of 'the removal question' in evaluating the district court's exercise of discretion."[10] Third, and most important, **the Sixth Circuit has repudiated its earlier position**. In *Stallworth v. Greater Cleveland Regional Transit Authority*,[11] it discussed earlier Ninth and Fifth Circuit decisions approving review of the propriety of the underlying remand upon review of a fees order and held that "[o]n the authority of these cases" it would do likewise.[12] The Sixth Circuit concluded that "a circuit court might hold: 'The district court obviously erred in remanding the case. We can do nothing about that; but we hold that an award of attorney fees flowing from such error is an abuse of discretion.'"[13] If there ever was an inter-circuit conflict concerning the propriety of reviewing the legal merits of the underlying remand for the purpose of reviewing an award of costs and fees under Section 1447(c), there is none now.

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[9] *See Miranti*, 3 F.3d at 928.

[10] *Id.* at 928 (*quoting Bucary*, 883 F.2d at 449).

[11] 105 F.3d 252 (6th Cir. 1997).

[12] *Id.* at 255.

[13] *Id.* at 255 n.3 (rhetorical quotation marks in original).

The approach of the Third, Fourth, Fifth, Sixth, Ninth and Tenth Circuits accords with *Cooter & Gell v. Hartman Corp.*,[14] in which this Court noted that:

> "**motions for costs or attorney's fees are 'independent proceeding[s] supplemental to the original proceeding and not a request for a modification of the original decree.'** . . . Like the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather it requires the determination of a collateral issue . . . ."[15]

This approach does not frustrate Congress' purposes in preventing direct review of remand orders, as the Third Circuit has pointed out:

> "Section 1447(d) is intended to avoid the delays attendant upon appeal from an order of remand. [*Citations omitted.*] An evaluation of an order of remand in the context of the review of an award of fees under section 1447(c) does not raise the concerns regarding delay that section 1447(d) seeks to avoid, as that evaluation will not interfere with the proceedings in the state court."[16]

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[14] 496 U.S. 384, 110 S.Ct. 2447 (1990).

[15] *Id.* at 395-96 (emphasis added).

[16] *Mints*, 99 F.3d at 1260-61. *Accord Stallworth*, 105 F.3d at 255.

Petitioner's suggestion that this approach creates "a judicial morass" and an "impossible conflict" (Petition, p. 7) when state courts are required to determine whether it is the district court's remand order, or the Court of Appeals' reversal of the collateral fee award, that is entitled to preclusive effect under the Full Faith and Credit Act,[17] is simply unfounded. It is the second federal determination (necessarily the decision of the Court of Appeals) that is entitled to preclusive effect in subsequent state proceedings.[18] This is how it should be. No public policy or equitable consideration requires that collateral estoppel effect be given to a ruling that has later been found by a reviewing court to be legal error.

Petitioner simply presents no good reason for this Court to review for error a procedural rule that enjoys the express assent of half the circuits, suffers the dissent of none, and accords with this Court's own pronouncements. This is particularly so when law, equity and common sense coincide in their recommendation of a rule that enjoys such widespread recognition. This Court should decline review.

II THIS COURT NEED NOT REVISIT LAST TERM'S DECISION IN *HARRIS TRUST* FOR THE PURPOSE OF DETERMINING WHETHER THE UNANIMOUS CIRCUITS ARE IN ERROR.

Petitioner next argues that the opinion below conflicts with prior decision of this Court and various courts of appeal.

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[17] 28 U.S.C. § 2283.

[18] *E.g., Robi v. Five Platters, Inc.*, 838 F.2d 318, 322-23 (9th Cir. 1988). *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 15 (1982).

The fulcrum upon which this argument turns is his claim that "there is no ERISA provision regulating a party-in-interest's *self initiated* violations (such as fraud, breach of contract, breach of fiduciary duty). Since there is no regulation of the party-in-interest's self-initiated wrongs, there is no 'ERISA governed relationship.'" (Petition, p. 9 [emphasis in original].) He conveniently ignores the fact that this Court held last term in *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*[19] that a nonfiduciary party-in-interest's participation in a prohibited transaction does implicate an "ERISA governed relationship"– ERISA provides a specific equitable remedy to redress such a violation.

Petitioner presumably relies upon the italicized phrase "self initiated" to justify omitting all mention of *Harris Trust*. What "self initiated" means is unclear: It apparently refers to his argument that this Court in *Lockheed Corp. v. Spink*[20] held that a nonfiduciary party-in-interest can be sued under ERISA only if a fiduciary "caused" the prohibited transaction. Petitioner seems to imply that this requires the joinder of a cause of action against a fiduciary to any claim against a party-in-interest. (Petition, pp. 8-9.) Since he conveniently omits such a cause of action from his own complaint, Petitioner concludes that court below erred in concluding that his complaint alleged a prohibited transaction violation against the Respondent.

In trying to navigate his argument between Scylla and Charybdis, Petitioner manages to founder on both.

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[19] – U.S. –, 120 S. Ct. 2180 (2000).

[20] 517 U.S. 882, 889 & n.3, 116 S.Ct. 1783, 1789 & n.3 (1996).

First, this Court announced no such joinder rule in *Lockheed*. All it did was announce the truisms that (1) a nonfiduciary party-in-interest cannot be subject to equitable relief for engaging in a prohibited transaction if the prohibited transaction rules were, in fact, not violated, and (2) the prohibited transaction rules are not violated if plan fiduciaries honor the proscriptions of ERISA § 406. ERISA imposes no joinder requirements. That the Federal Rules of Civil Procedure might require such joinder does not compel the conclusion that ERISA does not completely preempt Petitioner's complaint. Instead, it leads to the conclusion that the complaint is vulnerable to attack, whether under Rule 12, or by way of demurrer under state law.

Second, Petitioner's complaint does allege that a "fiduciary caused the plan to engage in an unlawful transaction." (Petition, p. 9.) Paragraph 16 of the Complaint alleges that "[t]he Trusts on behalf of plaintiffs, paid defendants' bills without plaintiffs knowing that they were being charged more than $155 per hour." (App. G, p. 73a.) The "Trusts" are the ERISA plans in question. (App. G, p. 70a, ¶ 1.) "[P]laintiffs" are Petitioner (in his capacity as a plan participant) and a putative class containing all of the other participants. (*Id.*) The "Trusts," being noncorporeal entities, cannot have "paid defendants' bills" except by acting through their fiduciaries (or agents of the fiduciaries). While a lack of knowledge is alleged on behalf of the "plaintiffs" (that is, the participants), no similar lack of knowledge concerning Respondents' billing practices is ascribed to the plan fiduciaries who "paid defendants' bills."

Petitioner's artful pleading is simply not artful enough to hide the fact that he is suing to disgorge allegedly-excessive fees paid to a service provider by a plan. If the fees are excessive (a fact denied by Respondent, but of no moment at

this juncture of the proceedings), then under *Harris Trust* ERISA provides a specific and exclusive remedy.

As a hedge against the possibility that his omission of all mention of *Harris Trust* might be noticed, Petitioner cites decisions from various circuits holding that "ERISA does not generally preempt state law contract, negligence and malpractice actions brought by plans against nonfiduciary service providers." (Petition, p. 11.) In doing so, Petitioner ignores the important difference between causes of action based on duties of performance owed by nonfiduciary service providers to plans, and those based on financial irregularities in the relationship between a service provider and the plan it serves. Duties of performance arise out of the contractual arrangements between plans and their service providers, and state law doctrines defining standards of professional due care owed by service providers to their plans. Although ERISA regulates duties of performance owed by fiduciaries to their plans,[21] it does not prescribe duties of performance owed by nonfiduciary service providers. In contrast, ERISA expressly regulates the financial relationships between nonfiduciary service providers and plans through the prohibited transaction rules set forth in Sections 406(a) and 408(b) (28 U.S.C. §§ 1106[a] and 1008[b]). Even more precisely, ERISA expressly forbids, and provides a remedy to plan participants for, the actions which Petitioner charges

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[21] See ERISA § 404, 29 U.S.C. § 1104(a)(1)(B) (imposing a duty on plan fiduciaries to perform services "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use.").

against Respondents: overcharging a plan for services.[22] The opinion below expressly adopted this distinction. (App. A, p. 23a n.12.)

Each of the decisions cited by Petitioner come out of suits brought by fiduciaries in the name of their plan to redress the failure of service providers to satisfy state law duties of performance. That each of these decisions found no ERISA preemption demonstrates that the opinion below was consistent with them, not that it created an inter-circuit conflict. In *Airparts Co. v. Custom Benefit Services,*[23] an actuarial firm failed to provide timely advice concerning statutory changes, miscalculated benefits, and prepared a useless plan amendment. In *Pappas v. Buck Consultants, Inc.,*[24] plan actuaries were sued for mishandling distributions so as to leave the plan underfunded. In *Custer v. Sweeny,*[25] a plan attorney was sued for his failure to provide competent representation to the plan in connection with abusive

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[22] Section 406(a)(1)(C), 29 U.S.C. § 1106(a)(1)(C), prohibits the payment of plan assets to "parties in interest." Any person or entity that provides service to an ERISA plan, even if not a fiduciary, is a "party in interest." 29 U.S.C. § 1002(14)(B). Section 408(b)(2), 29 U.S.C. § 1108(b)(2), permits the payment of reasonable compensation to providers of necessary services to the plan, including legal services, notwithstanding the prohibition set forth in Section 406(a)(1)(C). Payments exceeding agreed-upon rates–the basis of Petitioner's complaint–fall outside the exemption provided in § 408(b)(2), and thus necessarily violate § 406(a)(1)(C).

[23] 28 F.3d 1062 (10th Cir. 1994).

[24] 923 F.2d 531 (7th Cir. 1991).

[25] 89 F.3d 1156 (4th Cir. 1996).

transactions initiated by a plan trustee. In *Painters District Council No. 21 v. Price Waterhouse,*[26] plan auditors were sued for their failure to properly identify a plan administrator's mishandling of assets. In *Arizona State Carpenters Pension Trust v. Citibank,*[27] a bank was sued because it failed to meet its obligation to notify plan trustees about defaults on interest and principal payments on investments instruments, causing the plan additional losses.

This distinction serves the important function of supporting the bright line between participant enforcement of ERISA's standards governing fiduciary conduct and prohibited transactions, on the one hand, and costly (and unwarranted) interference with the day-to-day operation of plans on the other. ERISA's civil enforcement provision, § 502 (29 U.S.C. § 1132), empowers participants to police fiduciary misconduct (including, per *Harris Trust*, to seek disgorgement of ill-gotten gains from nonfiduciary service providers), but does not permit participants to question the business judgment of fiduciaries by suing for ordinary breaches of contract by plan service providers. Petitioner brings this lawsuit not in his capacity as a plan trustee, but purely as a participant seeking to represent a class of participants. It is the structural analog to a shareholder's derivative action. The distinction between duties of performance and ERISA-imposed financial duties is the analog of the Business Judgment Rule when derivative litigation concepts are applied in the ERISA context. Just as any plaintiff in a shareholder's derivative suit would be pleased to do away with the impediments of the Business

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[26] 879 F.2d 1146 (3d Cir. 1989).

[27] 125 F.3d 715 (9th Cir. 1997).

Judgment Rule, Petitioner would like to avoid the implications of this distinction, so that he may ignore the limitations of ERISA's civil enforcement provisions and fashion a state law basis to challenge the business judgment of plan trustees. However, he presents no sound public policy to justify his ambitions.

Petitioner's attempt to create the appearance of a conflict between the opinion below and decisions of this Court, the other circuits, and earlier decisions of the Ninth Circuit is a failure. The opinion below accords with this Court's decision in *Harris Trust*, and strikes the proper balance between traditional state law regulation of the duties of performance owed by professional service providers such as attorneys, accountants, actuaries and consultants, and ERISA's regulation of the financial relationships between service providers and plans.

CONCLUSION

For the reasons set forth above, Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

/s/_____

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